Supreme Court, U.S.
FILED

101327 APR 15 2011

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No.

IN THE

Supreme Court of the United States

JUSSI K. KIVISTO, PETITIONER

v.

THE FLORIDA BAR

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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pro se

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QUESTIONS PRESENTED

The objective evidence shows the probability that Judge Leroy H. Moe, the Referee in these proceedings, was actually biased, had prejudged the case, and willfully misrepresented a material fact in a judicial proceeding in order to remain in the case.

The objective evidence shows the probability that the prosecutor, Michael David Soifer, Esq., suborned perjury, fabricated evidence, and willfully misrepresented a material fact in a judicial proceeding in order to protect the financial position of a major law firm.

The questions presented are.

1. Whether the Due Process Clause of the Fourteenth Amendment was violated when the Supreme Court of Florida failed to recuse the Referee.

2. Whether the Due Process Clause of the Fourteenth Amendment was violated when the Supreme Court of Florida failed to disqualify the prosecutor.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 4

REASONS FOR GRANTING THE PETITION 7

CONCLUSION 11

APPENDIX

A. Judgment of the Supreme Court of Florida (Sept. 28, 2010) 1a
B. Judgment of the Supreme Court of Florida (Sept. 28, 2010) 2a
C. Judgment of the Supreme Court of Florida (Nov. 16, 2010) 3a
D. Order of Supreme Court of Florida (Dec. 8, 2008) 4a
E. Order of Supreme Court of Florida (May 1, 2009) 5a
F. Order of the Referee (October 6, 2008) 6a
G.Order of the Referee (October 9, 2008) 7a
H. Petitioner Response to Order to Show Cause (July 24, 2010) 8a
I. Petitioner Motion for Evidentiary Hearing (Sept. 23, 2010) 25a
J. Robbins Grievance August 1, 2005) 32a
K. Petitioner Response to Grievance (Oct. 23, 2006) 39a
L. Petitioner Response to Grievance (Dec. 6, 2006) 72a
M. The Brooke Astor Papers 76a
N. The Gorman Papers 83a

O. Robbins fax to JASA (Jan 7, 2002) 87a
P. Johnson Estate Letters of Administration (April 6, 2004) 89a
Q. NYC Medicaid fax to Robbins(June 11, 2004) 91a
R. Robbins fax to NYC Medicaid(July 22, 2004) 93a
S: Petitioner Verified Motion To Reassign (Nov. 6, 2008) 95a

TABLE OF AUTHORITIES

Page

CASES

ASHCROFT V. IQBAL, 129 S. CT. 1937 (2009) 17
BERGER V. UNITED STATES, 295 U.S. 78,88 (1935) 24
BERUBE V. STATE, 978 SO.2D 893 (FLA. 2D DCA 2008) 27
BRACY V. GRAMLEY, 520 U.S. 899 (1997) 3
CAPERTON V. MASSEY, 129 S.CT. 2252 (2009) ..... PASSIM
CONNICK V. THOMPSON 563 U. S. ____ (2011) 24, 34
CUEVAS V. KELLY, 873 SO. 2D 367 (2ND DCA 2004) 12
IN RE MURCHINSON, 349 U.S. 133 (1955) 3
MATTER OF JASA, AS CONSERVATOR OF THE PROPERTY OF MARIA CEDENO, 674 N.Y.S. 2D 34 (1ST DEPT. 1998) 6
NAPUE V. ILLINOIS, 360 U.S. 264, 269 (1959) 3, 24, 34
PASTOR V. PASTOR, 929 SO.2D 576 (4TH DCA 2006) 12
SUNTRUST BANK V. GUARDIANSHIP OF NICHOLS, 701 SO.2D 107, 10 (FLA. 5TH DCA, 1977) 11
TABLEAU FINE ART V. JACOBONI, 853 SO. 2D 299, 302-03 (FLA. 2003) 27
TOBKIN V. STATE, 889 SO.2D 120 (FLA. 4TH DCA 2005) 29, 32
WITHROW V. LARKIN, 421 U.S. 35 (1975) 3, 24

STATUTES

28 U.S.C. § 1257(a) 1
42 U.S.C 1983 17
42 U.S.C 1985(2) 17
42 U.S.C 1985(3) 17

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 1

RULES

Fla. R. Jud. Admin. 2.330(e) 29
Fla. R. Jud. Admin. 2.330(j) 27

OPINIONS BELOW

The judgments of the Supreme Court of Florida are not reported. Pet. App. 1a-2a The orders of the Supreme Court of Florida denying the disqualifications are not published. Pet. App. 4a-5a The orders of the Referee denying the disqualifications of the Referee and prosecutor are not published. Pet. App 6a-7a

JURISDICTION

The judgment of the Supreme Court of Florida was entered on September 28, 2010. A petition for rehearing was denied on November 16, 2010. Pet. App.3a On February 7, 2011 Justice Thomas extended the time within which to file a petition for certiorari up to and including April 15, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1.

> No State shall . . . deprive any person of life, liberty, or property, without due process of law....

STATEMENT

A fair tribunal is a basic requirement of due process. A biased decisionmaker is constitutionally unacceptable; a prosecutor who suborns perjury and fabricates evidence is constitutionally unacceptable.

When there is both a constitutionally intolerable probability of actual bias and a constitutionally intolerable probability of fabrication of evidence, as there is in this case, this may be called a constitutionally intolerable probability of the corruption of the judicial process.

Facts that create a constitutionally intolerable probability of the corruption of the judicial cannot be defined with precision. The facts in this case are extreme. There is decisionmaker whose comments evidence a constitutionally intolerable probability of actual bias who goes as far as to willfully misrepresent a material fact in a judicial proceeding to avoid being recused. There is a prosecutor whose conduct evidences a constitutionally intolerable probability of fabrication of evidence who goes as far as to willfully misrepresent a material fact in a judicial proceeding in order to protect the financial position of a major law firm.

This case is about the constitutionally intolerable probability of the corruption of the judicial process by the law firm, Miller, Canfield, Paddock and Stone, LLC (MC); by MC attorney, Susan I. Robbins, Esq., (Robbins); by Florida Bar prosecuting attorneys, Michael David Soifer, Esq. (Soifer) and Kenneth Lawrence Marvin, Esq. (Marvin); and, by Judge Leroy H. Moe, who served as the Referee (the Referee) in these proceedings.

In the facts and circumstances of this case the probability of the corruption of the judicial process is too high to be constitutionally tolerable. *Caperton v. Massey*, 129 S.Ct. 2252 (2009); *Bracy v. Gramley*, 520

U.S. 899 (1997); *Withrow v. Larkin*, 421 U.S. 35 (1975); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *In re Murchinson*, 349 U.S. 133 (1955)

Petitioner summarized this probability of the corruption of the judicial process to the Florida Supreme Court (FSC) as recently as July 24, 2010 in Response to Order to Show Cause (Pet. App 8a-24a) (Show Cause) and September 23, 2010 in Motion for Evidentiary Hearing. (Pet App 25a-31a) (Evidentiary)

In order to cover up erroneous legal advice that Robbins and MC gave to New York City Medicaid (NYC Medicaid) between April and July 2004, which caused NYC Medicaid to lose approximately $138,000.00, Robbins framed Petitioner in August 2005 by filing with the Florida Bar (TFB) under penalties of perjury, a bad faith, knowingly false grievance (the Robbins Grievance) accusing Petitioner of Medicaid fraud. (Pet. App. 32a-38a)

Petitioner filed his final responses to the Robbins Grievance on October 23, 2006 and December 6, 2006. Pet App. 39a-71a, 72a-75a Petitioner's responses remain unopposed by Robbins. In December, 2006 TFB took Medicaid fraud off the table but continued to investigate for another year. Pet. App 72a-75a

Thereafter, in order to protect MC's financial position in the Brooke Astor Guardianship, beginning July 2006, and subsequently in the Brooke Astor Estate, beginning August 2007, MC and Robbins, acting jointly with Soifer and Marvin, framed Petitioner by fabricating evidence. TFB, on December

6, 2007, filed a fabricated, excessive fee complaint against Petitioner with the FSC, under the signature of Soifer and Marvin; the Honorable Leroy H. Moe was appointed Referee to preside over the disciplinary proceedings.

In 2007 Robbins would prove instrumental in taking down Brooke Astor's son, Anthony Marshall. (the Brooke Astor papers) Pet. App. 76a-82a

Since the MC, Robbins, Soifer and Marvin had fixed the proceedings before the Referee, after the Referee refused to recuse himself and to disqualify the prosecutor, Soifer, Petitioner ceased participating in the proceedings before the Referee and took his case directly to the FSC.

On October 30, 2008 the Referee struck Petitioner's pleadings and signed an order of default submitted and prepared, it its entirely, by Soifer and Marvin.

On December 17, 2008 the Referee signed a Report of Referee, again submitted and prepared by Soifer and Marvin, recommending Petitioner's disbarment. On September 28, 2010 the FSC, directing the clerk to process the case as it would an uncontested report of referee, disbarred Petitioner.

The record before the Referee has 109 docket entries; the record before the FSC has some 200 docket entries. Petitioner contested the case before the FSC with such vigor that the FSC deemed it an abuse of the processes of the court, issuing on July 9, 2010, *sua sponte*, an order to show cause. Perhaps that was the

reason that on May 20, 2010 the FSC, *sua sponte*, had suspended Petitioner, without giving reasons, from the practice of law.

TFB is a mandatory, integrated, or unified bar association, a body created by and existing under the authority of the FSC, and an official arm of the FSC. The FSC and TFB have denied all Petitioner's requests for the production of Petitioner's confidential file which TFB admits to having. TFB files are more difficult to obtain than Nixon's Watergate tapes.

This is understandable. Admitting that there is a cancer in its arm is not something the FSC is, at this time, prepared to do.[1]

This case begins in March 1999 when the New York Supreme Court (NYSC) appointed Jewish Association for Services for the Aged (JASA) the guardian of the person and property of Milja Johnson. (Johnson) Robbins acted as the attorney for JASA.

In the fall of 2000 JASA placed Johnson into the Prospect Park nursing home and applied for a

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[1] For example, the Referee failed, in December 2008, although required by R. Regulating the Fla. Bar 3-7.7(n)(3) to prepare, serve on Petitioner, and file with the FSC an index of record, with its 109 docket entries, along with his report of referee. On March 17, 2009 Petitioner filed a Motion to Dismiss on the ground of improper procedure. More than a year later, on May 20, 2010, in the same order in which the FSC, *sua sponte*, suspended Petitioner, the FSC denied the motion, but directed TFB to prepare, serve, and file the index of record. Since the prosecution had written both the Referee's default judgment and the report of referee the prosecution was well qualified for this task.

discharge—because Johnson had entered a residential facility on a long-term basis, under New York law JASA, being a "community guardian program",[2] no longer qualified to serve as guardian.

On October 31, 2001 the NYSC appointed Adrienne Gorman M.A. C.S.W. (Gorman) successor guardian for Johnson, first having appointed Gorman stand-by guardian in July, 2000.

Mirjam Aho, related to Johnson, died testate at the Finnish American Nursing Home in Lake Worth, FL in June 2001, at the age of 97, leaving a gross estate of approximately $150,000.00 in five bank accounts. Petitioner acted as attorney for the Aho Estate.

Johnson, then also age 97, was the sole beneficiary of the Aho Estate—there were four contingent beneficiaries, all related to both Aho and Johnson, and all living in Finland.

On January 18, 2002 Prospect Park informed Petitioner, confirmed by Gorman the same day, that Gorman was Johnson's guardian. On February 1, 2002, after Petitioner informed JASA about Johnson's inheritance, JASA confirmed that Gorman was Johnson's successor guardian.

Five weeks later, on March 7, 2002, Robbins met with the NYSC, *ex parte*, without notice to Gorman, and requested to have Ms. Gorman removed as

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[2] See *In the Matter of JASA, as Conservator of the Property of Maria Cedeno*, 674 N.Y.S. 2d 34 (1st Dept. 1998)

guardian. On March 15, 2002 the NYSC removed Gorman as Johnson's guardian [3] and appointed attorney, Phyllis Solomon, successor guardian of the person. Two months later Solomon, learning for the first about her appointment, declined her appointment, leaving, by default, according to Robbins, JASA as guardian.

On May 22, 2002 Robbins called Petitioner demanding to know how much money was in the Aho Estate. Petitioner declined to reveal the size of the estate, such as it was, without first being provided with certified guardianship documents evidencing JASA's authority to act on behalf of Johnson. Robbins failed to provide current, certified documents.

A few weeks later Gorman confirmed that, without explanation or notice, Robbins had removed Gorman as Johnson's guardian. Pet. App. 83a-86a (the Gorman papers)

Petitioner informed New York Judge Gangel-Jacob, that in Petitioner's view, after Robbins learned about the Florida inheritance, Robbins had perpetrated a fraud on the court and on Gorman by having Gorman removed as Johnson's guardian.

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[3] Judge Gische gave the following reason: "It having come to the court's attention that the Order of October 31, 2001 erroneously appointed a successor property guardian, when in fact the IP will have no funds once her pending bills are paid by JASA, the court hereby rescinds its decision and order of October 31, 2001 and this decision and order is made in its stead."

An unpleasant "he said, she said" correspondence campaign ensued after which time Robbins, after Petitioner had provided the Aho Estate file to the judge, in September, 2002, agreed to have another successor guardian appointed.

Robbins is such a respected specialist in guardianship and elder law in Manhattan that in July 2006 the NYSC appointed Robbins as attorney for Brooke Astor in the well publicized and contested Brooke Astor guardianship proceedings in Manhattan. Brooke's Astor's grandson, Phillip Marshall, retained Robbins and Miller,Canfield to represent him in the Brooke Astor Estate after Brooke Astor's death on August 13, 2007.

As stated earlier Robbins was instrumental in having Brooke Astor's son, Anthony Marshall, indicted and convicted for probate fraud and grand larceny.

It was Robbins who came to believe that Brooke Astor's signature had been forged on one of the Brooke Astor's codicils; it was Robbins who retained a handwriting expert to confirm the forgery; it was Robbins who informed the district attorney that the signature on one of Mrs. Astor's codicils was forged.

Robbins denied knowing about the Florida Florida inheritance prior to having Gorman removed as Johnson's guardian. The facts show that five weeks after Petitioner called JASA, Robbins' client, Robbins requested, *ex parte*, that Gorman be removed.

On July 29, 2009 Petitioner, after TFB denied Petitioner access to its confidential files, rooting around

the NYSC's closed files in Manhattan, uncovered "smoking gun document", in particular a letter from Robbins to JASA, dated January 7, 2002. Pet. App. 87a-88a That letter shows that in early 2002, at a time when Robbins did not know about the Florida inheritance, Robbins was more than willing to have Gorman take over the Johnson guardianship. All Robbins was waiting for was a certified commission from Gorman:

> Once you are in receipt of Ms. Gorman's commissions I can send JASA the check or send the check directly to Ms. Gorman.
>
> Once you are in receipt of the cancelled checks, please send them to me, along with the reconciliation, so that I can draft the final order discharging JASA.

Since January 18, 2002 Petitioner had also been waiting for Gorman's current, certified guardianship documents. Since Gorman did not have an attorney and since Robbins did not advise her to obtain one Gorman was unable to obtain a commission.

Before Petitioner and Robbins were able to settled their differences, a bitter dispute, Johnson died, intestate, in New York on January 6, 2004. The four contingent beneficiaries of the Aho Estate were also the intestate heirs of the Johnson Estate. Both the Aho and Johnson estates were family matters. According to Florida law, on the death of Johnson, the Finnish Beneficiaries became the owners of the Florida money subject to the claims of creditors. [4]

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[4] § 732.101(2) Fla. Stat. (2005)

The Finnish Beneficiaries retained Petitioner to probate the Johnson Estate in Florida, filing for probate with the Palm Beach County Probate Court on February 25, 2004. Petitioner notifying Robbins the next day about the decision that had been made in Finland and that the Finnish Beneficiaries refused to have the money distributed to JASA.

On April 6, 2004 the Palm Beach County Probate Court, with the unanimous consent of the Finnish Beneficiaries, appointed Petitioner executor of the Johnson Estate. The Johnson Estate letters of administration (Pet App 89a-90a) specifically authorized Petitioner to take possession of the assets of the Aho Estate.

Pursuant to Florida law Petitioner notified potential creditors and other interested persons—NYC Medicaid, the nursing home, Robbins, MC, JASA—about the time limitations to file claims and of their right object to venue in Florida and to Petitioner's qualifications as executor. No claims or objections were filed. Consequently, NYC Medicaid forfeited its claim.

Without warning, on April 23, 2004 Robbins caused JASA to file, through Florida counsel, HodgsonRuss, a Motion to Compel Distribution, seeking to have JASA, as guardian for the now deceased Johnson, take possession of the Florida money.

This was unacceptable to the Finnish Beneficiaries. If JASA was not qualified under New

York law to take possession of the money while Johnson was alive; JASA's status did not improve after Johnson died: the Motion to Compel was frivolous.[5] Petitioner moved to dismiss the Motion to Compel; no opposition was filed in response. Robbins and MC folded and in return requested payment of their fees. Petitioner agreed.

On July 14, 2004 the parties in the probate litigation, JASA, the Aho Estate, and the Johnson Estate, executed a Stipulation for Order of Dismissal with Prejudice of the Motion to Comel, the terms of which had been reduced into writing: payment of MC and Hodgson,Russ fees. Accordingly after the Johnson Estate paid MC $10,000.00 and HodgsonRuss $14,323.61 the Palm Beach County Probate Court, on July 16, 2004, dismissed with prejudice JASA's Motion to Compel Distribution. Pet. App. 16a-24a

The reader may have guessed by know that the Johnson Estate, having received no claim from NYC Medicaid, did not pay NYC Medicaid.

When Robbins learned that the Johnson Estate had not paid NYC Medicaid, Robbins filed the Robbins Grievance (Pet App. 32a-38a) alleging, *inter alia*, that Petitioner:

> knew there should not have been a Florida Estate proceeding since all the funds due to Ms.

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[5] Being nothing more than an interloper, JASA had no standing in the Florida probate proceedings. *SunTrust Bank v. Guardianship of Nichols*, 701 So.2d 107, 10 (Fla. 5th DCA, 1977).

> Johnson would be used in NY to pay the NY guardianship proceeding and to pay back Medicaid or the nursing home.

and that Petitioner:

> is committing a Medicaid fraud since Medicaid is the preferred creditor of Ms. Johnson's Estate.

These are Alice in Wonderland arguments. Not only is Florida law clear that the probate was proper in Florida,[6] the letters of administration and the order dismissing the motion to compel are *res judicata* on that issue. Pet App 89a-90a, 23a-24a. Robbins had also been notified in writing that she could object to venue and chose not to object.

The matter that TFB covers up is that Robbins committed perjury [7], a second degree felony, by filing the Robbins Grievance: Robbins knew that Petitioner had not committed Medicaid fraud. This was clear even to TFB by July 2006 as Robbins was being appointed by the NYSC to represent Brooke Astor.

More importantly, NYC Medicaid had until January 6, 2006 to apply to the Palm Beach County Probate Court to extend the time to file a claim.[8] The Robbins Grievance was filed on August 1, 2005. One of the grounds for extending time to file a creditor claim is fraud.[9] No petitions to extend time were filed. Had

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[6] *Pastor v. Pastor*, 929 So.2d 576 (4th DCA 2006); *Cuevas v. Kelly*, 873 So. 2d 367 (2nd DCA 2004)

[7] § 837.02(2) Fla. Stat. (2005)

[8] § 733.710 Fla. Stat. (2005)

[9] § 733.702(3) Fla. Stat. (2005

Robbins actually believed that Petitioner had committed Medicaid fraud Robbins would simply have had NYC Medicaid petition the Palm Beach County Probate Court to extend the time to file a claim, alleging Medicaid fraud as the reason.

After examining Robbins' time records Petitioner concluded that the reason NYC Medicaid had not filed a claim in the Palm Beach County Probate Court was because Robbins had told them it was not necessary to do so.

For example, on June 11, 2004 NYC Medicaid wrote to Robbins: Pet. App 91a-92a

> Pursuant to your request, please be advised that Medicaid paid a total of $138,405.50....
> [NYC Medicaid] is a preferred creditor against the estate [Johnson] for the amount of the Medicaid provided.
> Should you require a formal proof of claim, please so advise and one will be provided.

In a "smoking gun" letter, dated July 22, 2004, from Robbins to NYC Medicaid, also discovered on by Petitioner on July 29, 2009, Robbins responded to NYC Medicaid, advising that it was not necessary for NYC Medicaid to file a proof of claim: Pet App 93a-94a

> Enclosed is information I received from Mr. Kivisto regarding submitting claims against Ms. Johnson's Estate in case the city wants to file a claim in Florida. If you have any questions, do not hesitate to contact me and I will do my best to assist you.

This advice was fatal to NYC Medicaid, causing NYC Medicaid to forfeit its $138,000.00 claim. Rather than admitting their mistake to NYC Medicaid Robbins and MC decided to extort the $138,000.00 from Petitioner through the Robbins Grievance.

That is perjury; that is fraud; that is extortion: perjury that Soifer and Marvin suborned; fraud and extortion which they aided and abetted.

Robbins was not going to go to probate court for the world to see that her bad legal advice had caused NYC Medicaid to forfeit its claim. Further NYC Medicaid had no grounds to petition for an extension of time and Robbins knew it. Robbins also knew that she had no grounds to file the Robbins Grievance.

Accordingly in response to the Robbins Grievance, with the unanimous consent of the Finnish Beneficiaries, on or about October 21, 2005, Petitioner distributed the Johnson Estate to the Finnish Beneficiaries, wiring to each of the four Finnish Beneficiaries $13,000.00, for a total distribution of $52,000.00. This left Petitioner an attorney fee of approximately $48,000.00 for the Johnson Estate together with his fee of $10,000 for the Aho Estate. Pet App 30a-31a.

In December 2006 TFB informed that TFB had taken Medicaid fraud off the table. However, TFB continued to investigate for another full year.

In order to manufacture an excessive fee case from these facts Robbins, MC, Soifer, and Marvin, in the face of documentary evidence to the contrary,

alleged that in the July 14, 2004 Settlement Petitioner agreed to limit his fees Aho Estate fees to $10,500.00. Since the accounting showed that Petitioner received fees of $48,000.00 Soifer and Marvin allege, Petitioner committed fraud. As the accounting shows Petitioner had already received a $10,500.00 for fees and costs from the Aho Estate, prior to the death of Johnson.

Soifer and Marvin would have this Court believe that after Petitioner won the motion to compel, Petitioner agreed, on July 14, 2004, to pay the losing attorneys approximately $25,000.00 but agreed to take no fee for winning the lawsuit. This flies in the face of reason.

In order to prevent a public relations disaster for MC and to save Robbins' court-appointment as Brooke Astor's attorney Robbins and MC, jointly with Soifer and Marvin, framed Petitioner by fabricating an excessive fee case against Petitioner. They flat out made up a story: in the July 14, 2004 Settlement Petitioner had agreed to limit his fees to $10,500.00.

In a ¶ 38 of a TFB Complaint filed with the FSC on December 6, 2007 Soifer and Marvin allege:

> 38. The motion to compel distribution was eventually settled with respondent [Kivisto] agreeing to accept $10,500.00 in attorneys fees for his work on the Aho Estate.

It was not until the November 10, 2008 hearing when Soifer willfully misrepresented this material fact in the judicial proceeding did it become clear to Petitioner to what depths of corruption TFB had been

prepared to go in order in order to protect MC's financial position in the Brooke Astor matter.

At an April 8, 2008 status conference Petitioner filed, in open court with the Referee, his Motion to Dismiss TFB Complaint, arguing, *inter alia*, that the perjury in the Robbins Grievance, suborned by Soifer and Marvin, mandated the quashing of TFB Complaint. The Referee wanted to hear the 37-paged motion with two appendices running more than 50 pages, on the spot, without Soifer having even read the Motion to Dismiss.

Although the Referee was persuaded to continue the hearing to April 14, 2008 it was clear the Referee would not hear the Motion to Dismiss.

Petitioner moved to disqualify the Referee based upon actual bias and prejudgment, and as required by the rules filed his Answer. [10]

At the April 14, 2008, without opposition from TFB, without hearing or argument, the Referee ruled, *sua sponte*, that the Motion to Dismiss was moot and denied Petitioner's motion to disqualify as being legally insufficient. The Referee's ruling that the motion to dismiss was moot was intentional, deliberate, and willful error on the part of the Referee

Petitioner appealed the Referee's refusal to recuse himself by petition for writ of prohibition to the

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[10] R. Regulating the Fla. Bar 3-6.7(g)(2) provides: "Respondent shall answer the complaint and, as part thereof or by separate motion, may challenge...the complaint...".

FSC, which petition was summarily denied without comment. Show Cause ¶ 8. Pet App 10a.

On September 22, 2008 Petitioner filed, *Kivisto v. Miller,Canfield.*[11] a 49-paged, 14-count complaint (Kivisto I), *inter alia*, against MC, Robbins, Soifer and Marvin alleging that the defendants' attempt to extort money from Petitioner constituted (1) RICO violations predicated upon mail fraud and extortion under the Hobbs Act;[12] and (2) violations of civil rights statutes, namely, 42 U.S.C 1983; 42 U.S.C 1985(2); 42 U.S.C 1985(3).

The district court dismissed Kivisto I for insufficient pleading under *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009) stating that the factual allegations in the complaint:

> suggest one very obvious, lawful explanation for the Defendants' actions—a bar complaint

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[11] 08-61519, 2010 WL 2196472 (S.D. Fla. June 1, 2010), *affirmed*, No. 10-12654, 2011 WL 207898 (11th Cir. Jan. 25, 2011), rehearing *en banc denied*, April 5, 2011.

Petitioner will file a separate petition for writ of certiorari seeking review of the judgment of the Eleventh Circuit in Kivisto I.

[12] Petitioner's RICO theory is based upon predicate acts of mail fraud and Hobbs Act extortion. On February 1, 2011, in *Chevron v. Donziger* 11-691-LAK (S.D.N.Y.) Chevron filed RICO lawsuit against lawyers and consultants whom Chevron alleged were engaging in fraudulent litigation in Ecuador against Chevron. Chevron's RICO theory based upon predicate acts of mail fraud/extortion is similar to Petitioner's theory in Kivisto I.

that, after investigation, led to a bar proceeding against Plaintiff:

Since the bar proceeding was based on evidence fabricated by the defendants during that investigation the factual allegations in Kivisto I suggested an obvious, unlawful, rather than an obvious, lawful explanation. The Eleventh Circuit, in affirming the district court, did not even mention the "obvious, lawful explanation".

On September 20, 2010 Petitioner then filed *Kivisto v. Soifer et al*, 10-61758 UU (S.D.FL), a 52-paged, 8-count civil rights complaint (Kivisto II) based upon the defendants' fabrication of evidence during the investigation referred to and relied upon by the district court in Kivisto I.[13]

On September 23, 2008 Petitioner moved to disqualify Soifer on the grounds that Soifer would be as a necessary witness in Kivisto I and under Florida law and the Due Process Clause for Soifer's suborning Robbins' perjury—a tribunal is a basic requirement of due process.

At a September 29, 2008 hearing the Referee denied Petitioner's motion to disqualify Soifer. (Pet. App. 6a). On October 7, 2008 Petitioner appealed to the FSC the Referee's denial to disqualify Soifer by petition for constitutional writ, under Florida law and

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[13] On March 14, 2011 the district court dismissed Kivisto II, *inter alia*, on *res judicata* grounds, holding that perjury on July 2005 arose from the same operative facts as the perjury on November 10, 2008. Petitioner filed notice of appeal on April 11, 2011.

the Due Process Clause. The FSC summarily denied the petition without comment on December 8, 2008 and denied rehearing on May 1, 2009. Pet. App. 4a, 5a[14]

At the conclusion of the 9/23/2008 hearing the Referee read into the record, *sua sponte* and *sotto voce*:

> I want to make sure too, on the record, you know, that everybody understands, in reality that, professionally, I have an open mind on the merits of the case.

This is just the type of subjective inquiry on the part of the judge that *Caperton v. Massey*, 129 S.Ct. at 2258, 2263 does not permit:

> He [the Judge] indicated that he "carefully considered the bases and accompanying exhibits proffered by the movants." But he found "no objective information . . . to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial.
> The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.

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[14] See also Show Cause ¶ 17. Pet. App.13a

On October 6, 2008 Petitioner moved again to disqualify the Referee under the Due Process Clause, Florida law, and the Florida Code of Judicial Conduct based upon the Referee's actual bias and prejudgment. Again the Referee refused to recuse himself. Pet App.7a.

On October 20, 2008 Petitioner appealed to the FSC by petition for writ of prohibition, under the Due Process Clause, Florida law, the Florida Code of Judicial, the Referee's refusal to recuse himself, serving, on October 18, 2008, a copy of the petition on the Referee and TFB by mail. Show Cause ¶ 8. Pet App 10a. The FSC summarily denied the petition without comment on May 1, 2009. Pet. App 5a.

At a hearing held before the Referee on November 10, 2008 the Referee and Soifer, in relevant part, had the following exchanges:

> And by way of mitigation, The Bar would concede that Mr. Kivisto does not have a prior disciplinary record. And that's also reflected on this affidavit. I guess we could mark this as The Bar's Exhibit 2.
> THE COURT: **Well, do you have to admit that into evidence?**
> MR. SOIFER: Well –
> THE COURT: I'll accept your representation.
> .....
>
> THE COURT: -- the letters in her [Johnson Estate] estate is [sic] void too. It's a fraud on the court.

Johnson was never a resident of Florida, didn't own any real property. And all of a sudden the inventory is deemed confidential. I have no idea how you can deem an inventory confidential. [15] It [proof of service of inventory] says a copy of the inventory was mailed to, in effect, his [Petitioner's] relatives, who were allegedly the heirs. That might be why he didn't want to participate in these proceedings.

.....

THE COURT: Yeah. How could he get away with opening the Johnson estate in Palm Beach County, when there's no allegation to establish venue, except that she owned personal property. And personal property follows the situs of the owner. The inventory is suspiciously deemed confidential. Which, of course, leads me to believe there's no real property in Palm Beach County. There's no basis to invoke the jurisdiction in Palm Beach County in the estate.

.....

But whatever happened, you know, there's no reason in the world why he should have filed a federal lawsuit naming you a defendant. That is just plain wrong. But I want you to know how much I appreciate all the hard work and effort that you went into in representing The Bar in prosecuting this case. I really appreciate it.

.....

[15] § 733.604(12) Fla. Stat. (2005) deemed then and deems now that estate inventories are confidential.

> THE COURT: No. I just want it -- I'm going to include it in my order as reason for his possible intentional non-participation in these proceedings, because I think he [Petitioner] had a fear of being found out that the whole Johnson estate was a farce, a total fraud on the court.
>
> .....
>
> THE COURT: I think it's set for 33131. A person's estate can only be probated in a county if she resided there when she died or if she owns property there. Now, the question is whether or not she owned property. I don't think she owned any property in Palm Beach County.
>
> THE COURT: And if that's true, Palm Beach County does not have jurisdiction in any way, shape or form over her estate. And if it's true, that the Johnson estate, they ripped everybody off, including Ms. Johnson, while she was alive. You understand what I mean?
>
> MR. SOIFER: Uh-huh.

If this record does not demonstrate a sufficient degree of bias and prejudgment to require a judge's recusal it is difficult to imagine what would. The Referee's comments evidence a constitutionally intolerable probability of actual bias and prejudgment

This Referee waxed eloquently in his impromptu soliloquy in September 29, 2008 that, he had "an open mind on the merits of the case". The Referee's own words, a month later, with the microphone running, objectively show the reverse: the Referee's bias and prejudgment.

That the Referee believes, without a shred of evidence, that the Finnish Beneficiaries are the Petitioner's relatives who "ripped everybody off"; that the Petitioner "had a fear of being out that the whole Johnson estate was a farce, a fraud on the court; that the letters of administration were "void" staggers the mind. The Referee, improperly, collaterally attacked prior orders of the Palm Beach County Probate Court: the April 6, 2004 letters of administration and the July 16, 2004 order dismissing the motion to compel with prejudice. Pet App 89a-90a, 23a-24a. Petitioner has made available to TFB and the FSC Finnish parish church records which prove beyond any doubt that the Finnish Beneficiaries are the intestate heirs of Milja Johnson.

REASONS FOR GRANTING THE PETITION

These proceedings have been a charade from their inception prompted by Robbins' perjury to cover her incompetence, then by Robbins' and MC's fabrication of evidence in order not to lose a prized client, the Brooke Astor guardianship and estate.

This charade has been sustained by the active participation of Soifer and Marvin both in the perjury and the fabrication of evidence; and, by the active participation of the Referee who was biased, who had prejudged the case and who was so determined to remain in the case that he misrepresented not having seen or received Petitioner's Verified Amended Motion to Disqualify Referee.

The facts evidence a constitutionally intolerable probability that the proceedings were fixed; the facts

evidence a constitutionally intolerable probability of the corruption of the judicial process, requiring the recusal of the Referee and the disqualification of the prosecutor, Soifer.

This Court emphasized in *Caperton v. Massey*, 129 S.Ct. 2252, 2257 (2009):

> Under our precedents there are objective standards that require recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. " quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

Applying the precedents set out in *Caperton* to the facts and circumstance of this case, due process requires recusal of the Referee. The FSC fell into constitutional error by failing to disqualify the Referee.

This Court emphasized in *Connick v. Thompson* 563 U. S. ____ (2011) (slip op) (opinion of the court at 19)

> The role of a prosecutor is to see that justice is done. *Berger v. United States*, 295 U.S. 78,88 (1935). "It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

This Court held in *Napue v. Illinois*, 360 U.S. 264, 269 (1959)

> First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment... (citations omitted)

Applying the precedents set out in *Caperton*, *Connick* and *Napue*, to the facts and circumstance of this case, due process requires the disqualification of the Soifer. The FSC fell into constitutional error by failing to disqualify.

This Court should grant certiorari to make clear to TFB and the lawfirms it champions that we are nation of laws and that no one, including state bar prosecutors, are above the law. This court should grant certiorari to protect the integrity of the judicial system.

To show that the rule of law applies to prosecutors, judges and powerful lawfirms, alike, is exceptionally important to the preservation of public confidence in the administration of justice.

Members of the public here, in particular, social worker Adrienne Gorman and the Finnish Beneficiaries, have witnessed a full scale war lasting more than five years by TFB, an official arm of the FSC, against Petitioner who, on behalf of members of the public, dared to take an unpopular position against a powerful lawfirm whose financial interests he threatened.

Robbins shunted Gorman aside like Thursday cabbage when MC's financial interest was at stake. As recently as November 10, 2008 the Finnish

Beneficiaries have witnessed the Referee's personal attacks on them, "they ripped everybody off"; accused of being related to Petitioner and accused of participating in a "farce", "fraud on the curt" for doing nothing more than probating their aunt's estate in Florida and requesting that creditors file and prove their claims in probate court pursuant to Florida law.

As well intentioned as the FSC is, it simply is not equipped or willing to rein in rogue prosecutors like Soifer and Marvin, who have the unchecked power to act outside the law when the opportunity presents itself.

A. The refusal of the Florida Supreme Court to recuse the Referee conflicts with the decisions of this court.

Because of a constitutionally intolerable probability that the Referee was biased, had prejudged the case, and had willfully misrepresented a material fact in the judicial proceeding in order to remain in the case, the FSC was constitutionally required to disqualify the Referee. *Caperton v. Massey*, 129 S.Ct. 2252 (2009).

The material fact that the Referee willfully misrepresented in the judicial proceeding was his not having seen or received Petitioner's Verified Amended Motion to Disqualify hand-delivered to him in the afternoon of October 6, 2008.

In the morning of October 6, 2008, Petitioner personally hand-delivered to the Referee—to the Referee's judicial assistant in his chambers—Verified

Motion to Disqualify Referee. Approximately at 2:00 p.m. on October 6, 2008 Petitioner personally hand-delivered to the Referee—to the Referee's judicial assistant in his chambers—Verified **Amended** Motion to Disqualify Referee, mailing a copy to the Referee, TFB, and the FSC. Pet App 100a-105a. Show Cause ¶ 4. Pet App. 9a

The filing of amended motion causes the motion that has been amended to become moot. On October 9, 2008 the Referee denied Petitioner's Verified Motion to Disqualify Referee, that is, denied the motion that had been rendered moot. Pet. App 7a. That left the Verified Amended Motion to Disqualify not ruled upon.

Fla. R. Jud. Admin. 2.330(j) provides

> if the judge does not rule within 30 days of the service of the motion to disqualify, the motion shall be deemed granted and the moving party may seek an order from the court directing that the clerk reassign the case.

In *Tableau Fine Art v. Jacoboni*, 853 So. 2d 299, 302-03 (Fla. 2003) the FSC imposed a bright-line, 30-day rule on disqualification orders and confirmed that the burden is on the court, not the litigants, to assure a determination within 30 days.[16]

Pursuant to *Tableau Fine Art* Petitioner's Verified Amended Motion to Disqualify was deemed granted on November 5, 2008—30 days after October 6,

---

[16] See also *Berube v. State*, 978 So.2d 893 (Fla. 2d DCA 2008)

2008. As a matter of Florida law the Referee was disqualified on November 5, 2008.

Prior to the running of the 30 days, at the hearing held on October 20, 2008, Petitioner specifically reminded the Referee that he had not ruled, but must rule, on the Verified Amended Motion to Disqualify before proceeding with that hearing:

> I [Petitioner] filed a Motion for Prohibition and I just wanted to make sure it got there by 8:00. I sent it Federal Express and hand delivered it as well. Also, you will get a copy of my Motion for Prohibition this morning. I do want to point out one thing if I may, your Order denying the Motion to Disqualify is not the motion that was before you. The motion that was before you was an Motion to Verify an Amended Motion. [sic] What you denied was the verified motion.
>
> THE COURT: No, that is not correct. You are not here
>
> .....
>
> THE COURT: Have you said all you are going to say on the merits of the bar's motion?
>
> MR. KIVISTO: No, because you cut me off on that.
>
> THE COURT: No. No. No. Don't say that. I don't want the record to reflect that I you cut you off.

> MR. KIVISTO: What I am saying is that the motion—I had a deposition [petition] which was filed with you on October 6th around 2:00, a motion for you to disqualify yourself. **It was called a Verified Amended Motion. And before that it had been a Verified Motion. And you signed that Order on the 9th**. I got it on Thursday the 16th, which is about 7 days late. But the motion that is denied was not the motion that was before you. **You denied the Verified Motion to Disqualify rather than the Verified Amended Motion to Disqualify**. So, my position right now is that this hearing can not go forward until the ruling on the Verified Amended Motion, because you ruled on the incorrect motion. That is my position on it. The Supreme Court now does have the Emergency Writ of Prohibition and the Emergency Writ of Stay with respect to your recusal. That has been filed.

Since Petitioner renewed the Verified Amended Motion to Disqualify at the October 20, 2008 hearing, Fla. R. Jud. Admin. 2.330(e) required the Referee to rule immediately, at that hearing, on the Verified Amended Motion to Disqualify.

Tobkin v. State, 889 So.2d 120 (Fla. 4th DCA 2005) held that a trial court's failure to rule on a recusal motion within 30 days did not require the judge's automatic recusal, where the clerk mistakenly failed to forward the motion to the judge, the movant had mailed the judge's copy to the wrong courthouse, and the judge ruled on the motion within six days after

becoming aware of the motion, and one day after receiving it. There is no such mistake here.

Pursuant to Rule 2.330(j), on November 7, 2008, Petitioner filed with the FSC Verified Motion to Reassign Case, serving, on November 6, 2008, the Referee and TFB by mail. Pet App 95a-105a. Attached to the Verified Motion to Reassign was a copy of the October 6, 2008 Amended Verified Motion to Disqualify.[17]

Being able to add, TFB realized Petitioner has squarely placed the *Tableau Fine Art* bright-line, 30-day problem in the record before the FCS. There is no discretion here. It is a simple mathematical calculation. The 30 days were up on November 5, 2008; the Referee was automatically disqualified.

On December 29, 2008 TFB sought leave to file an untimely response to Petitioner's Verified Motion to Reassign, signaling to the FSC, without a shred of authority, that the Amended Verified Motion to Disqualify was "subsumed" in the Referee's ruling on the Verified Motion to Disqualify on October 9, 2008.

TFB forgot that the Referee had blown a hole through TFB's "subsumed" theory by flat out denying, in open court, at the November 10, 2008 hearing, that the Referee had seen or received Petitioner's Verified Amended Motion to Disqualify.

---

[17] The FSC denied the Verified Motion to Reassign on May 1, 2009 without comment. Pet. App. 5a

THE COURT: All right. A default on the allegation and the merits of the allegation was entered by an order signed by the referee on October 30th, 2008. The findings in that order were discussed in open court. It is true that that order was prepared by Bar counsel, Mr. Soifer, and that I was out of town and just arrived back in town, I believe, on the 30th. And I read through it. And there were a couple of editorial changes I might have made. And a couple of things I would have worded differently. I'm fully aware of my responsibility to make sure the order accurately reflects what happened. And that in a perfect world I would have dictated the whole thing myself. But as it recites, it came on for hearing, October 20th, and then I was out of town for a whole week or more. And by the time I got it, it was October 30th. And the final hearing was set for November 10th. So time is of the essence. And due to other logistical matters, I signed the order as submitted by The Florida Bar. I say that, because in the latest copy of a verified motion duly assigned the case, it refers to or at least alleges that Bar counsel prepared that order. Which is true. Nonetheless, the doesn't effect the accuracy of what happened.

.....

THE COURT: Yeah. I noticed here, too, **throughout this pleading and other pleadings**, Mr. Kivisto refers to the allegation that such as in **paragraph four of page three** petitioner's amended verified motion to disqualify referee was submitted to the court

> and submits that it was deemed granted. I want to say that when I received this matter, I told my judicial assistant, Paula, that it shall and will receive the utmost priority and, of course, to keep me informed on anything said, done or attempted to be done or said or filed or anything relating to the case. **And without subjecting myself to cross-examination on this matter, I will state that I never saw or received anything called petitioner's amended verified motion to disqualify referee that is referred to in this latest pleading called verified motion to reassign case, to vacate orders and emergency motion to stay, which was purported or evidently filed in the Supreme Court of Florida just recently. So that's all I can say about that.** (emphasis supplied)

¶ 4 page 3 of Petitioner's Verified Amended Motion to Reassign, (Pet App. 98a) referred to by the Referee, *supra*, as "this pleading" which pleading the Referee has in front of him and from which he is reading, provides as follows:

> Petitioner's Amended Verified Motion to Disqualify Referee was deemed granted, Petitioner submits, on 11/5/08, *nunc pro tunc*, 10/6/08. Judge Moe was deemed disqualified as of 10/6/08. Clearly, Judge Moe has no legal authority to conduct a Final Hearing on Sanctions on 11/10/08.

Since Petitioner's Verified Amended Motion to Disqualify is attached to "this pleading" that the

Referee is reading from, namely, the Verified Motion to Reassign, served by mail on the Referee on October 6, 2008, under no objective standard is the Referee telling the truth. All the Referee has to do is flip the page and there it is: Petitioner's Verified Amended Motion to Disqualify Petitioner's Verified Amended Motion to Disqualify was also attached to "other pleadings", namely, Petitioner's appeal to the FSC on October 20, 2008 of the Referee's refusal to recuse himself on October 9, 2008 which appeal by petition for writ of prohibition, was served by mail on the Referee on October 18, 2008. Pet App 7a

At the October 20, 2008 hearing Petitioner told the Referee that the petition should reach him in the October 20, 2008 mail and told him that the Verified Amended Petition to Disqualify had been delivered to the Referee in the afternoon of October 6, 2008.

There is sufficient objective evidence to show a constitutionally intolerable probability that the Referee misrepresented a material fact—not having seen or received Petitioner's Verified Amended Motion to Disqualify—for the purpose of not having to recuse himself. This willful misrepresentation of this material fact requires, by itself, the Referee's recusal under the reasoning of *Caperton*.

B. The refusal of the Florida Supreme Court to disqualify the prosecutor conflicts with the decisions of this court.

Because of a constitutionally intolerable probability that Soifer suborned perjury, fabricated evidence, and by personally introducing the fabricated

evidence at the November 10, 2008 hearing, willfully misrepresented in the judicial proceeding a material fact, the FSC was constitutionally required to disqualify Soifer under the principles set out in *Caperton v. Massey*, 129 S.Ct. 2252 (2009); and *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Connick v. Thompson* 563 U. S. ____ (2011) (slip op)

The material fact that Soifer willfully misrepresented in the judicial proceeding was that in the July 14, 2004 settlement Petitioner had agreed to limit his fees to $10,500.

Not until the November 10, 2008 hearing, did Soifer make clear to Petitioner that the August 1, 2005 perjury of the Robbins Grievance was to be compounded and covered up by the perjury of fabrication of evidence.

Soifer represented in that judicial proceeding as follows: Show Cause ¶ 18, Evidentiary. Pet App 13a, 252-21a

> The -- as you can see that this went on until July 13th of 2004, when the stipulate -- the time now talks about the stipulation of the settlement and the facts. This matter was settled in July of 2004. An that's when Mr. Kivisto agreed to take the $10,500 as his fee for the Johnson estate.
>
> Then he [Petitioner] found out that she [Johnson] died and that her beneficiaries were in Finland, he saw this opportunity for himself, and he opened Johnson estate in Florida. He forced JASA to hire an attorney down here. Thus,

> costing the estate more money in attorney's fees, to file that motion to compel distribution before he finally agreed to take a fee of $10,500 in the Aho estate. [18]

Despite documentary evidence concerning the terms of the July 14, 2004 Settlement—payment of $10,000.00 to MC and $14,323.61 to HodgsonRuss—Soifer personally advanced the fabrication of evidence before the Referee in the judicial proceeding.

Robbins had specifically represented to TFB in writing, under penalties of perjury, in the Robbins Grievance what the terms of the July 14, 2004 Settlement were: Pet App. 37a

> [t]he Aho Estate was settled with payments to JASA for JASA's commissions (which fees are turned over to NYC Department of Social Services) and Miller Canfield's fees and payment to JASA's Florida counsel.

The written terms of the settlement were confirmed in a July 16, 2004 HodgsonRuss "smoking gun' letter Petitioner discovered in July 2009. The HodgsonRuss letter to Robbins, written the two days after the July 14, 2004 Settlment states in relevant part: Pet. App 19a-20a

> Enclosed please find official bank check from Wachovia made payable to the order of

[18] Petitioner did not become aware of the extent of the 11/10/2008 perjury until he ordered the transcripts of the hearing and submitted them to the FSC in April 2009.

> Miller,Canfield in the amount of $10,000.00. Pursuant to your prior instructions, upon receipt of this check, along with the payment of our legal fees by official bank check from Mr. Kivisto in the amount of $14,323.61....
>
> This concludes the matter as far as we are concerned.

There is sufficient objective evidence to show a constitutionally intolerable probability that Soifer misrepresented a material fact in a judicial proceeding—that in the July 14, 2004 Settlement Petitioner had agreed to limit his fees to $10,500.00. This willful misrepresentation of this material fact requires, by itself, Soifer's recusal under the reasoning of *Caperton, Connick, and Napue.*

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Jussi K. Kivisto, *Pro se*
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(561) 271-9472
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September 28, 2010
Supreme Court of Florida
Tribunal No(s).: 2006-50,163(15E)

THE FLORIDA BAR
Complainant(s)
vs.
JUSSI KUSTAA KIVISTO
Respondent(s)

Respondent's Motion to Accept Brief in Support of Petition for Review as Timely Filed is hereby denied.

Respondent's petition for review is hereby dismissed on the Court's own motion based on Respondent's failure to timely file an initial brief on the merits in accordance with this Court's order dated May 20, 2010. Respondent's initial brief filed with this Court on June 28, 2010, and Respondent's amended initial brief and appendix filed with this Court on July 8, 2010, are hereby stricken. In light of Respondent's initial brief, amended initial brief, and appendix being stricken, The Florida Bar's answer brief filed with this Court on July 20, 2010, and the Respondent's reply brief filed with this Court on July 26, 2010, are hereby stricken as they are not required.

The Clerk's Office is hereby directed to process this case as it would an uncontested report of referee.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PARRY, JJ., concur.

September 28, 2010
Supreme Court of Florida
Tribunal No(s).: 2006-50,163(15E)

THE FLORIDA BAR
Complainant(s)
vs.
JUSSI KUSTAA KIVISTO
Respondent(s)

The uncontested report of the referee is approved and respondent is disbarred. Respondent is currently suspended, therefore this disbarment is effective immediately. Respondent shall fully comply with Rule Regulating the Florida Bar 3-5.1(g).

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Jussi Kustaa Kivisto in the amount of $6,061.16, for which sum let execution issue.

Not final until time expires to file motion for rehearing, and if filed, determined. The filing of a motion for rehearing shall not alter the effective date of this disbarment.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

November 16, 2010
Supreme Court of Florida
Tribunal No(s).: 2006-50,163(15E)

THE FLORIDA BAR
Complainant(s)
vs.
JUSSI KUSTAA KIVISTO
Respondent(s)

Respondent's "Motion for Rehearing, Motion for Relief from Judgment and Order, and Motion for Stay" is hereby denied. All other requests for relief are hereby denied.

CANADY, C. J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and FERRY, B., concur.

MONDAY, DECEMBER 8, 2008
Supreme Court of Florida
Tribunal No(s).: 2006-50,163(15E)

THE FLORIDA BAR
Complainant(s)
vs.
JUSSI KUSTAA KIVISTO
Respondent(s)

Respondent's "Petition for All Writs or Constitutional Writ of Prohibition" filed with this Court on September 26, 2008, is hereby denied.

Respondent's "Amended Petition for All Writs or Constitutional Writ of Certiorari or, in the Alternative, for All Writs or Constitutional Writ of Prohibition and Emergency Motion for Stay" filed with this Court on October 7, 2008, and supplement thereto filed on November 10, 2008, are hereby denied.

QUINCE, C.J., and WELLS, ANSTEAD, PARIENTE, LEWIS, CANADY, and POLSTON, JJ., concur.

May 1, 2009
Supreme Court of Florida
Tribunal No(s).: 2006-50,163(15E)

THE FLORIDA BAR
Complainant(s)
vs.
JUSSI KUSTAA KIVISTO
Respondent(s)

Upon consideration of respondent's "Emergency Petition for a Writ of Prohibition and Emergency Motion for Stay" filed with this Court on October 20, 2008, and amendment and supplement thereto, the petition for writ of prohibition is hereby denied.

Upon consideration of respondent's Verified Motion to Reassign Case, to Vacate Orders and Emergency Motion for Stay" filed with this Court on November 7,2008,the request to reassign the case and vacate orders of the referee is hereby denied.

Respondent's motion for rehearing filed with this Court on December 16, 2008, is hereby denied.

Respondent's "Petition for All Writs or Constitutional Writ of Prohibition Nunc Pro Tunc 12/10/08 to Quash Florida Bar Complaint" filed with this Court on December 19, 2008, is hereby denied.

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, LABARGA, and PERRY,JJ., concur.

October 6, 2008
Supreme Court of Florida
Tribunal No(s).: 2006-50,163(15E)

THE FLORIDA BAR
Complainant(s)
vs.
JUSSI KUSTAA KIVISTO
Respondent(s)

ORDER ON KIVISTO'S S VERIFIED AMENDED MOTION TO DISQUALIFY ATTORNEY

THIS CAUSE, having come before the referee for hearing an September 29, 2008 on Kivisto's Verified Amended Motion to Disqualify Attorney, and the referee being fully advised in the premises, it is FOUND, ORDERED AND ADJUDGED

1. That the Motion is denied.

DONE AND ORDERED

October 9, 2008
Supreme Court of Florida
Tribunal No(s).: 2006-50,163(15E)

THE FLORIDA BAR
Complainant(s)
vs.
JUSSI KUSTAA KIVISTO
Respondent(s)

ORDER ON RESPONDENT'S VERIFIED MOTION TO DISQUALIFY

THIS CAUSE, was considered by the court on the following:

Respondent's Motion to Disqualify Referee. No hearing was held on the motion.

THE COURT having considered the grounds for the Motion and considered the applicable law, it is FOUND, ORDERED AND ADJUDGED a follows:

1. The Motion is legally insufficient,
2. The Motion is denied.

DONE AND ORDERED

No. SC07-2281
IN THE SUPREME COURT OF FLORIDA
The Florida Bar File
2006-50,163(15E)

The Florida Bar
v. Complainant

Jussi Kustaa Kivisto
Respondent

_____/

RESPONSE TO ORDER TO SHOW CAUSE

Respondent respectfully files his Response to this Court's Order to Show Cause entered July 9, 2010 and for grounds states as follows:

1. On June 17, 2010 Respondent filed with United States Supreme Court Application for Stay of this Court's May 20, 2010 Order.

2. S. Ct. R 23.3 provides in relevant part: An application for a stay shall set out with particularity why the relief sought is not available from any other court or judge. **Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof.** .....

3. Consequently the Petition for Stay, Amended Petition for Stay and Motions to Toll were filed to satisfy the requirement of the Supreme Court Rule.

4. The complainant filed a knowingly false grievance in July 2005—objectively baseless and a complete sham. The complainant accused the Respondent of Medicaid fraud (and theft) when the complainant knew that Respondent had not committed Medicaid fraud; the prosecution together with others have fabricated evidence in these proceedings; the Referee was constitutionally required to disqualify himself under *Caperton v. Massey*, 129 S.Ct. 2252 (2009); the Referee lied when he denied that he had not received Respondent's Amended Verified Motion to Disqualify. Respondent in Verified Motion to Reassign and Vacate, filed November 7, 2008, stated, under oath, that on October 6, 2008 Respondent had both mailed and hand delivered the Amended Verified Motion to Referee's chambers. Under *Tableau Fine Art Group, Inc. v. Jacoboni*, 853 So. 2d 299, 302-03 (Fla. 2003) the Referee was out.

5. The cumulative effect of this corruption rendered the proceedings below *ultra vires* resulting in a lack of subject matter jurisdiction. Faced with such *ultra vires* proceedings Respondent challenged the proceedings under (a) Constitutional Writ to Quash; (b) Constitutional Writ of Certiorari to Disqualify Mr. Soifer; and, (c) Constitutional Writ of Prohibition to Disqualify the Referee. As additional information became available Respondent sought to amend or supplement the petitions. That was a rational response under the circumstances.

6. In *Barwick v. State* 660 So.2d 685, 691 (Fla. 1995) this Court held that a denial of petitions for writs of prohibition, in cases, involving judicial disqualification, must state "with prejudice" to prevent further review on that issue.

Respondent has filed two Writs or Prohibition to Disqualify the Referee.

This Court has not denied any petition for a writ including prohibition with prejudice.

7. Generally, the "denial of a "writ ....without opinion is not [r]es judicata" when the denial is for reason other than the merits of the Petition. None of this Court's denials have been on the merits.

8. The first Petition to Disqualify the Referee was filed April 18, 2008; denied June 23, 2008; the second October 20, 2008 alleging new grounds for disqualification; denied May 1, 2009. In *Caperton v. Massey*, 129 S.Ct. 2252 (2009) the petitioner had filed three motions for recusal (together with rehearings) all of which had been denied. The Supreme Court disqualified the judge. As in *Caperton* both petitions have merit—the probability of actual bias and prejudgment on the part of the of the Referee are too high to be constitutionally tolerable.

9. Pursuant to this Court's directive in the May 20, 2010 Order these matters were addressed in the Amended Brief in Support of Petition for Review.

10. Attached is a summary of statements made by the Referee at the 11/10/08 Hearing

At 33: **The letters in her [Johnson Estate] estate is void too. It's a fraud on the court.**

At 38: **It [Proof of Service] says a copy of the inventory was mailed to, in effect, his relatives, who were allegedly the heirs.**

At 64: **[b]ecause I think he had a fear of being found out that the whole Johnson estate was a farce, a total fraud on the court.**

At 65: And if that's true, [Milja Johson did not own property in Palm Beach County] Palm Beach County does not have jurisdiction in any way, shape or form over her estate. And if it's true, that the Johnson estate, they ripped everybody off, including Ms. Johnson, while she was alive. You understand what I mean?

11. Referee states at page 11 of Report of Referee as follows:

Again, a default having been entered, by operation of law the Respondent is found guilty of the following allegations. **It should be noted, that even if a default had not been entered, the evidence on record shows clearly and convincingly that the Respondent did commit the violations with which he stands accused.**

12. The Referee's statements are objectively baseless meeting the objective disqualification standard of *Caperton*—the probability of actual bias and prejudgment on the part of the of the Referee are too high to be constitutionally tolerable.

13. Without the default all we have is TFB Complaint, Respondent's Amended Answer with Affirmative Defenses, Motion to Dismiss, Respondent's deposition of 1/31/2007, the probate files, and discovery. These documents prove Respondent's innocence of all charges. Even with the Default we still have Respondent's deposition testimony of January 31, 2007 which contradicts the allegation in the Complaint.

14. On March 7, 2008 this Court denied Respondent's first Constitutional Writ to Quash/Dismiss for lack of subject matter jurisdiction.

This was not a denial on the merits. The Court declined to exercise jurisdiction. Respondent provided addition information and filed for Rehearing and Stay on April 11, 2008; stay denied May 22, 2008; rehearing denied on June 23, 2008.

15. The unauthorized filings were the result of mistakes. Respondent mistakenly omitted a Motion For leave to file Reply resulting in the May 22, 2008 Order. Respondent made a another mistake that lead to the February 10, 2009 Order. On September 26, 2008 Respondent had filed a Constitutional Writ to Quash for lack of subject matter jurisdiction; on December 10, 2008 Petitioner filed an Amended Constitutional Writ to Quash—writ was served on December 9, 2008. Respondent did not know that on December 8, 2010 the Court had denied the 9/26/2008 petition. Therefore the two unauthorized filings were the result of a mistake on the part of Respondent.

16. The "unauthorized" Amended Constitutional Writ sought to supplement the 9/26/2008 petition with (a) relevant case law from New York *In the Matter of JASA, as Conservator of the Property of Maria Cedeno*, 674 N.Y.S. 2d (1st Dept. 1998) confirming that under New York law JASA was prohibited from providing guardian services for Milja as if 7/26/2000; was not the proper recipient of the Aho Estate proceeds; and, (b) relevant Florida case law, *Pastor v. Pastor*, 929 So.2d 576 (4th DCA 2006) and *Cuevas v. Kelly*, 873 So. 2d 367 (2nd DCA 2004) confirming that Palm Beach County Probate court had jurisdiction over the Johnson Estate. Consequently, Respondent filed Petition for Constitutional Writ to Quash Nunc pro Tunc on December 19, 2008 for the

purpose, *inter alia*, of bringing this case law to the attention of the Court; denied on May 1, 2009.

17. On December 8, 2008 this Court denied Constitutional Writ as amended and supplemental to disqualify Mr. Soifer; rehearing denied on May 1, 2009. Since Mr. Soifer has fabricated evidence Respondent feels that a Motion for Rehearing was merited. There have been only two Motions for rehearing, both denied.

18. Respondent has a constitutional right to bring wrongdoing to the Court's attention. Respondent stands his ground.
Mr. Soifer at the 11/10/2008 hearing at page 32:

> 13 Then he found out she died and
> 14 that her beneficiaries were in Finland, he
> 15 saw this opportunity for himself, and he
> 16 opened Johnson estate in Florida.
> 17 He forced JASA to hire an attorney down
> 18 here. Thus, costing the estate more money in
> 19 attorney's fees, **to file that motion to**
> **20 compel distribution before he finally agreed**
> **21 to take a fee of $10,500 in the Aho estate.**
> 22 But because he opened the Johnson estate, he
> 23 was able to go and do what he did, gild the
> 24 lily, and grab another $48,000 in fees, plus
> 25 his personal representative fee.

19. Respondent did not agree to take a fee of $10,500.00 in the Aho Estate in the Stipulation for Order of Dismissal with Prejudice of Motion to Compel Distribution signed July 14, 2004. The HodgsonRuss letter of July 14, 2010 to Ms. Robbins dovetails on all fours with Respondent's hand written notes of June 23,

2004 on the HodgsonRuss fax of June 22, 2004. (Exhibit A) Ms. Robbins statements in her grievance of July 2005 confirm the terms of the settlement. Nowhere in the grievance procedures or in Respondent's deposition did any one even suggest that Respondent make such agreement.

20. Only the perjured testimony of Ms. Robbins and Mr. Duffey will put this fabricated evidence into the record in the proceedings below. That the prosecution and the law firms were prepared to commit and suborn perjury in the proceedings below is deeply troubling. Respondent has the constitutional right not to participate in such proceedings.

21. The reason for the Motion for Mandamus and the Motion to Compel was to discover the particulars of this fabrication of evidence. Such particulars are contained in TFB's secret file.

22. It is now clear that NYC Medicaid approved Milja Johnson's Medicaid Application after the Ward's death and after probate had been filed in Florida. (Exhibit B) This means that at the time of her death Milja Johnson owed no money to NYC Medicaid.

23. NYC Medicaid has denied Respondent's freedom of information request by refusing to disclose how much, if any, when and to whom NYC Medicaid paid nursing home care on behalf of Milja Johnson. Respondent has filed suit in New York to compel NYC Medicaid to disclose the information.

24. TFB was and is under an obligation to disclose to Respondent, this Court, and the Probate Court in the Motion to Compel that on the date of her death Milja Johnson did not owe NYC Medicaid the approximately $125,000.00 NYC Medicaid allegedly

paid to Prospect Park after Milja Johnson's death. (Exhibit B)

25. The majority turns abuse of the legal system on its head. The abuse of the legal system comes by the prosecution who has corrupted the proceedings below not from the attorney who defends himself from such corruption.

26. The First Amendment guarantees "the right of the people . . . to petition the Government for redress of grievances." The right of access to the courts is one aspect of the right of petition protected by the First Amendment. In order to protect the Constitutional right to petition, the *Noerr-Pennington* doctrine "immunizes litigation and other petitioning conduct from liability." *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 113 S.Ct. 1920 (1993).

27. As stated in Motion to Motion to Accept Brief as Timely filed and Response to TFB Motion to Toll Time for its Answer Respondent made a mistake.

WHEREFORE, for the foregoing reasons Respondent respectfully states that he has adequately responded to the order to show cause.

***

Jussi K. Kivisto
1010 Tenth Avenue North, Suite 2
Lake Worth, Florida 33460-2107
Phone: (561) 588-5328; klfjk@aol.com
Fax: (561) 588-5419

By: //jk Kivisto/
J.K. Kivisto
July 24, 2010

Susan I. Robbins
MILLER CANFIELD
1450 Broadway
41st Floor
New York, New York 10018

June 29, 2004

J K. Kivisto, Esq.
1010 Tenth Avenue North, Suite 2
Lakewood, Florida 33460-2107

Re: In Re Milja Johnson

Dear Mr. Kivisto:

Further to our telephone conversation the other day, enclosed is Miller Canfield's statement for services rendered and disbursements incurred in the sum, of $19,207.67, which includes anticipated time for drafting numerous court documents necessary for JASA to settle its final account and to be discharged. As we discussed, our court will set our fees. Also enclosed is a draft of JASA's statutory commissions in the sum of $5,145.88. This schedule is based upon an old final account from June, 2001, as a new final account has not yet been prepared. I believe that JASA's commissions should be approximately $5,500 to $6,000. Additionally, JASA's guardianship bond is $365.00 per year,

Miller Canfield is holding $14,000 in our attorney IOLA account and JASA has on hand approximately $2,500. Accordingly, you should send me a check for $10,000 to cover the New York guardianship expenses.

I also enclose a letter from New York City's Human Resources Administration which states that Medicaid paid $138,405.50 for Milja Johnson and it is a preferred creditor.

Sincerely,
Susan I. Robbins

Brian K. Duffey, Esq.
HodgsonRuss LLP
1801 North Military Trail
Suite 200
Boca Raton, FL 33431

To: J.K. Kivisto, Esq
Kivisto Law Firm

Date: June 22, 2004

Re: Estate of Mirjam Aho

Pursuant to our conversation, attached please find copies of our Statements for Services (9/30/03 through 5/31/03) in the amount of $12,954.19. Please note, we also have $1,369.42 in unbilled fees and costs for a total amount due of $14,323.61

s/B.K. Duffey
cc: Susan Robbins (212) 704-4410

6/23/04 Agreed. I return on 7/6/04. You'll dismiss your motion to compel. I'll dismiss all my pleadings and file a petition for discharge with full waivers.

s/Jussi Kivisto

Brian K. Duffey, Esq.
HodgsonRuss LLP

July 14, 2004

VIA FAX (212-704-4410) AND FEDEX

Susan Robbins, Esq.
Miller, Canfield
1450 Broadway, 41st Floor
New York, New York 10018

Re: Jewish Association for Services for the Aged Community Guardian Program as Guardian of Milja Johnson

Dear Susan:

Enclosed please find an official bank check from Wachovia made payable to the order of Miller Canfield in the amount of $10,000. Pursuant to your prior instructions, upon receipt of this check, along with the payment of our legal fees by official bank check from Mr. Kivisto in the amount of $14,323-61, I have executed the Stipulation of order of Dismissal With Prejudice of motion to Compel Distribution (copy enclosed). Also enclosed for your records, which Mr. Kivisto has executed, are:

1. Voluntary Dismissal of Petition for Declaratory Relief
2. Voluntary Dismissal of Petition for Determination of Beneficiaries.

3. Voluntary Dismissal of Petition for Instructions and For Declaratory Relief.

This concludes this matter as far as we are concerned. If there is anything further that you require from me, please feel free to call. Otherwise, I will be closing my file on this matter,

Very truly yours,
Brian K. Duffey

IN THE CIRCUIT COURT FOR
PALM BEACH COUNTY , FLORIDA
PROBATE DIVISION
FILE NO. 2041 CP-0031501Y
Adversary Proceeding

IN RE: ESTATE OF MIRJAM AHO, Deceased

TOM WISTBACKA, as Personal Representative,
Petitioner,

v.

JEWISH ASSOCIATION FOR SERVICES FOR
THE AGED COMMUNITY GUARDIAN PROGRAM,
as Guardian of Milja Johnson

JUSSI K. KIVISTO, as Personal Representative of the
Estate of Milja Johnson, Respondent

STIPULATION FOR ORDER OF DISMISSAL
WITH PREJUDICE OF MOTION TO COMPEL
DISTRIBUTION

IT IS HEREBY STIPULATED by and among counsel for the Petitioner, Toini Wistbacka, as Personal Representative of the Estate of Mirjam Aho; for the Respondent, JASA Community Guardian Program, as Guardian of Milja Johnson; and Respondent, Jussi K. Kivisto, as Personal Representative of the Estate of Milja Johnson, that all matters and issues in controversy among them have amicably settled and adjusted.

WHEREFORE, the parties move this Court for an Order of Dismissal, with prejudice, of the Motion to Compel Distribution certified to have been served by the Respondent, JASA Community Guardian Program, as Guardian for Milja Johnson, on April 16, 2004 and for an Order canceling the Hearing set for July 19, 2004 at 2:45 p.m. on the Amended Motion to Dismiss Motion to Compel Distribution.

Jussi K. Kivisto,
KIVISTO LAW FIRM
1010 Tenth Avenue North, Suite 2
Lake Worth, FL 33460-2107

Brian K. Duffey, Esq.
HodgsonRuss LLP
1801 North Military Trail
Suite 200
Boca Raton, FL 33431

July 14, 2004

IN THE CIRCUIT COURT FOR
PALM BEACH COUNTY , FLORIDA
PROBATE DIVISION
FILE NO. 2041 CP-0031501Y
Adversary Proceeding

IN RE: ESTATE OF MIRJAM AHO, Deceased

TOM WISTBACKA, as Personal Representative,
Petitioner,

v.

JEWISH ASSOCIATION FOR SERVICES FOR
THE AGED COMMUNITY GUARDIAN PROGRAM,
as Guardian of Milja Johnson

JUSSI K. KIVISTO, as Personal Representative of the
Estate of Milja Johnson, Respondent

ORDER OF DISMISSAL WITH PREJUDICE OF
MOTION TO COMPEL . DISTRIBUTION

THIS CAUSE having come before this Court upon the Stipulation for Order of Dismissal with Prejudice of Motion to Compel Distribution and this Court being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion to Compel Distribution, certified to have been served by the Respondent, JASA, on April 16, 2004, is hereby dismissed with prejudice, The Hearing set for July 19, 2004 at 2:43 p.m on the Amended Motion To Dismiss Motion to Compel Distribution h hereby canceled.

DONE AND ORDERED in Delray Beach, FL this 16 day of July, 2004,

No. SC07-228
IN THE SUPREME COURT OF FLORIDA

Jussi Kustaa Kivisto
v.
Petitioner

The Florida Bar
Respondent
_____/

MOTION FOR EVIDENTIARY HEARING

Petitioner respectfully moves the Court for an evidentiary hearing concerning the prosecutorial misconduct of Mr. Soifer and Mr. Marvin and for grounds states as follows:

1. Petitioner incorporates herein all the pleadings, transcripts, and deposition filed herein.

2. As the Johnson Estate Final Accounting, dated October 15, 2005, attached, shows, that Petitioner charged the Finnish Beneficiaries of the Johnson Estate an attorney fee, from January 6, 2004 to October 15, 2005, in the mount of $ 48,715.00.[1] That has not been in dispute.

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[1] Whether part of the charges should have been allocated to the Aho Estate, is irrelevant. As of January 6, 2004—date of death of Milja Johnson—all of the money belonged to the Finnish Beneficiaries, who had the right to set and object to all fees.

3. In July, 2005 MillerCanfield filed a knowingly false grievance in bad accusing Petitioner of Medicaid fraud. MillerCanfield knew that Petitioner had not committed Medicaid fraud. Had MillerCanfield actually believed that, Petitioner, as personal representative of the Johnson Estate, had committed Medicaid fraud, MillerCanfield, on behalf of NYC Medicaid, would have petitioned the Palm Beach County Probate Court, under § 733.710 (the two years did not run out unitil January 6, 2006) to extend the time to file claim.

4. If this were an excessive fee case there would have been no need to fabricate evidence. Mr. Soifer's and Mr. Marvin's investigation would have led them to contact Petitioner's clients, the four (4) Johnson Estate Finnish Beneficiaries, who paid the $48,715.00 attorney fee to Petitioner, the $10,000.00 fee to MillerCanfield and the $14,715.00 to HodgsonRuss. Mr. Soifer and Mr. Marvin made no such contact.

5. Instead Mr. Soifer and Mr. Marvin, together with Miller,Canfield and Susan I. Robbins (and others), fabricated evidence, as has been previously set out, *inter alia*, in Petition for Mandamus, filed January 21, 2010, incorporated herein by reference, *viz.*, that the motion to compel distribution was eventually settled with Petitioner agreeing to accept $10,500.00 in attorneys fees for his work on the Aho Estate.

6. The fabrication of evidence can be seen from the transcript of the 11/10/08 hearing where Mr. Soifer testifies to the tribunal below (pages 28 and 32) as well as from TFB Complaint as follows:

3 The -- as you can see that this went on

> 4 until July 13th of 2004, when the
> 5 stipulate -- the time now talks about the
> 6 stipulation of the settlement and the facts.
> 7 This matter was settled in July of 2004. And
> 8 that's when Mr. Kivisto agreed to take the
> 9 **$10,500 as his fee for the Johnson [sic] estate.**
> 17 He forced JASA to hire an attorney down
> 18 here. Thus, costing the estate more money in
> 19 attorney's fees, to file that motion to
> 20 **compel distribution before he finally agreed**
> 21 **to take a fee of $10,500 in the Aho estate.**

¶ 38 of TFB Complaint states:

> 38. **The motion to compel distribution was eventually settled with respondent agreeing to accept $10,500.00 in attorneys fees for his work on the Aho Estate.**

6. That agreement is a complete fabrication. Once the Medicaid fraud was off the table the grievance collapsed; once the fabricated evidence is off the table TFB Complaint collapses.

7. Repeatedly Petitioner has brought to the Court's attention that there is a cancer in the arm of the Court, in the Florida Bar. Rather than confronting the matter head on this Court has simply shot the messenger.

8. As the administrative head of the TFB, this Court not only has the authori , but the duty, to hold TFB prosecutors accountable for prosecutorial misconduct—for fabrication of evidence. As is clear

from the pleadings in this case TFB is not going investigate itself.

9. Up to this point Petitioner has been right on the law. First, JASA was not the proper recipient of the Aho Estate proceeds. *In the Matter of JASA, as Conservator of the Property of Maria Cedeno*, 674 N.Y.S. 2d (1st Dept. 1998); The Palm Beach Probate Court properly took jurisdiction over the Johnson Estate probate. *Pastor v. Pastor*, 929 So.2d 576 (4th DCA 2006); *Cuevas v. Kelly*, 873 So. 2d 367 (2nd DCA 2004); under Florida law, only the Finnish Beneficiaries, had the right to object to Petitioner's attorney fees. *Hayes v. Guardianship of Thompson*, 952 So.2d 498 (Fla. 2006).

10. On Wednesday, September 22, 2010 Petitioner filed a federal civil rights Complaint, under 42 U.S.C §§ 1983, 1985(2) and 1985(3), against Michael David Soifer, Kenneth Marvin Lawrence, MillerCanfield, and Susan I. Robbins, in the Federal District for the Southern District of Florida, case No. 10-61758-CV, attached, and incorporated herein by reference, which sets out in detail the fabrication of evidence.

11. For this Court to suggest, as it did in the Order to Show cause, that this matter is frivolous or without merit has a taint of national origin discriminatory animus described in the federal complaint.

WHEREFORE, for the foregoing reasons Petitioner respectfully requests that this Court set an evidentiary hearing with respect the prosecutorial misconduct in the fabrication of evidence.

Pursuant to the provisions of § § 92.52 and 92.525, Fla. Stat. (2008), I, Jussi K. Kivisto, declare

under penalties of perjury of the State of Florida that I have read the foregoing and the facts set forth therein are true.

//jk Kivisto//
Jussi K. Kivisto

Date: September 23, 2010

IN THE CIRCUIT COURT FOR PALM BEACH
COUNTY, FLORIDA
PROBATE DIVISION
FILE NO. 502004CP000987XXXXSB

IN RE: ESTATE OF

MILJA JOHNSON
a/k/a Mitza Johnson
a/k/a Milja Wacklin

Deceased.
_____/

Final Accounting

Inventory received from Estate of Aho $130,500.00

(Aho Estate Inventory of $150,685.00
Less $10,500.00 jkk fees &costs,
$7,500.00 pr fee; 1,000.00 pr admin ex;
plus $1,185.00 pr expenses

Less: Miller, Canfield		10,000.00	
HodgsonRuss		14,385.00	
MJ atty jkk	48,715.00	(Fee based on time, complexity,	
(183.3 hrs@ $380		extraordinary services, results	
= $69,654.00)		F.S. 733.6171	
MJ-Pr fees-jkk @3%		3,900.00	
MJ-Costs--jkk		1,500.00	
		$78,500.00	

Total Assets on Hand
$52,000.00

ML-- $13,000.00
LJR-- $13,000.00
VEL--$13,000.00
SAV--$13,000.00

Executed this 15th day of October, 2005.

//jk kivisto//
Jussi K. Kivisto, Pers. Rep.

KIVISTO LAW FIRM
1010 Tenth Avenue North, Suite 2
Lake Worth, FL 33460-2107
Ph: (561) 588-5328; Fax (561) 588-5419
E-mail: klfjk@aol.com

By: //jk kivisto//
J.K. Kivisto
Fla. Bar No. 362638

8/1/2005
The Florida Bar
Inquiry/Complain Form

Part One: (Read instructions on reverse side.)

Your Name: Susan Robbins
Address: 1450 Broadway
City: New York
State: NY
Phone: (212) 704-4400
Zip Code: 10018

Attorney's Name: J.K. Kivisto
Address: 1010 Tenth Avenue North, Suite 2
City: Lake Worth
State: Fl
Phone: (561) 588-5328
Zip Code: 33460-2107

***
Part Four:
***
This is not a dispute between an attorney and a client but between two attorneys and the matter was being litigated and has now been settled

s/Susan Robbins
Date: 7/26/05

Part Two

I am in attorney in New York City and am associated with the law firm of Miller Canfield Paddock and Stone.

located at 1450 Broadway, 41st Floor, NY, NY 10018 (212) 704-4400. I have been practicing law for almost 20 years. My primary area of practice is representing community guardian programs ("CGP") in New York City. There are three CGP in New York City, Jewish Association for Services for the Aged ("JASA"), the New York Foundation for Senior Citizens, Guardian Services, Inc. and Selfhelp Community Services, Inc. I have represented all three CGP for 15 years. All CGP are not-for-profit agencies, funded by New York City to provide guardianship services to elderly and incapacitated persons residing in NYC.

JASA retained my services for its client Milja Johnson. JASA, as a CGP, pursuant to statute and its contract with New York City, can not serve as guardian to a person residing in a residential facility. Because Ms. Johnson needed to be placed in a residential facility, JASA petitioned the court to expand its powers to allow it to place Ms. Johnson in a residential facility, which motion was granted.

Thereafter, JASA learned that Ms. Johnson was the sole beneficiary of an Estate in Florida, the Estate of Mirjam Aho. In May, 2002 I contacted J. K. Kivisto, and informed him that I was counsel to JASA as Ms. Johnson's Guardian and inquired of the assets of the Aho Estate. He refused to tell me.

Within one week, Mr. Kivisto made a motion in the NY Supreme Court JASA Guardianship matter to intervene in the guardianship action. That motion was denied and enclosed is a copy of that order.

Thereafter, Mr. Kivisto repeatedly refused to turn over the Aho Estate assets to JASA as Ms. Johnson's Guardian. There were constant letters and telephone calls between Mr. Kivisto, the NY court and me. Finally, one year later on May 19, 2003, Mr. Kivisto sent me a letter with documents to settle the Aho Estate. The Aho Estate was $150,000 and consisted of several bank and/or brokerage accounts yet Mr. Kivisto sought legal fees and disbursements of $31,000 and personal representative fees of $7,500. Enclosed are these documents.

I then contacted Mr. Kivisto and asked him to send me a bill for his services and asked if Florida had a statute on personal representative fees since NY does. Mr. Kivisto refused to send me his bill but confirmed that there was a statute on a personal representative fees. What Mr. Kivisto did not tell me and what I later learned from other Florida attorneys, was that Florida has a statute on attorney's fees, NY does not. I also enclose a copy of letter from Judge Gangel-Jacob, the NY Supreme Court guardianship judge wherein after a conference call between the Court, Mr. Kivisto and me the Court recommended that Mr. Kivisto take $7,500 and requested that Mr. Kivisto provide his bill for services rendered in the Aho Estate. Mr. Kivisto refused the settlement and refused to provide his statement of legal services rendered.

Because Mr. Kivisto refused to turn over the Aho Estate to JASA, JASA, with the permission of the NY Court, hired local counsel in Florida. I contacted many attorneys in Florida who all confirmed that Mr. Kivisto's demand for $31,000 on a simple Estate was

unconscionable. Despite having counsel in Florida, Mr. Kivisto continued to refuse to turn over the funds to JASA and instead made baseless and frivolous motions. Enclosed are court papers from Florida giving a history of this case.

Thereafter, I received a telephone call from the husband of the personal representative of the Aho Estate, Mr. Wistbacka, wanting to know why the Aho Estate was not resolved since it had been over two years since Ms. Aho died. Mr. Wistbacka told me that on November 16, 2001 Mr. Kivisto had his wife write two checks, one to Mr. Kivisto for $10,500 and one to his wife for $7,500.00. This was shortly after Ms. Aho died and without the consent of Ms. Johnson the only beneficiary of the Aho Estate. Moreover, Mr. Kivisto never informed me nor the NY court that he had taken any fees. Additionally, the fees taken exceed the Florida statutes for both an attorney and personal representative fees, especially when at that point it was a simple Estate. In fact it always was a simple Estate but Mr. Kivisto in an effort to gorge the Aho Estate kept litigating and thereby increasing his fees. I also enclose a bill from Mr. Kivisto, which bill was finally given to JASA's Florida attorneys, which shows that through November 16, 2001 Mr. Kivisto had allegedly spent 34 hours on this matter. When I had previously asked Mr. Kivisto for his bill, as did the NY Court, Mr. Kivisto told me he did not keep time records. This statement from Mr. Kivisto in fact seems true since a large majority of Mr. Kivisto's reported hours are in full, i.e. 3.0. Additionally, Mr. Kivisto's notation for November 16, 2001, does not indicate that he was given a check for his legal fees.

Mr. Kivisto had been in touch with the nursing home where Ms. Johnson resided in NY. Mr. Kivisto knew that Ms. Johnson had no money and that Medicaid was meant to pay for Ms. Johnson's Estate. Moreover, I always informed Mr. Kivisto that the majority of the funds Ms. Johnson would receive from the Aho Estate would either be used to pay the nursing home or Medicaid. Correspondence to Mr. Kivisto from the nursing home is enclosed herewith.

On January 4, 2004 Ms. Johnson died and although she was the only beneficiary of the Aho Estate, which was now two and one-half years old, she had never received the benefit of those funds since Mr. Kivisto always refused to turn over the funds. I find this appalling. Moreover, in May, 2003, Mr. Kivisto was willing to turn over the funds to JASA if JASA had agreed to his outrageous fee of S31,000, twenty percent of the Aho Estate, instead of the 3% recommend by the Florida statute. Since JASA refused Mr. Kivisto's offensive demand for his fees, Ms. Johnson never was able to enjoy or benefit from her inheritance.

Thereafter, Mr. Kivisto applied and became the personal representative of Ms. Johnson's Estate in Florida. Ms. Johnson never resided in Florida and her only connection with Florida was the inheritance she was meant to receive from the Aho Estate and if the Aho Estate had been turned over to JASA there would be absolutely no connection with Florida. I enclose the Johnson Florida Estate papers.

Mr. Kivisto knew that there should not have been a Florida Estate proceeding since all the funds due to Ms.

Johnson would be used in NY to pay the NY guardianship proceeding and to pay back Medicaid or the nursing home. Since Ms. Johnson had been living in a nursing home for over three years, the cost was well in excess of $100,000. Moreover, Mr. Kivisto in becoming the personal representative of Ms. Johnson's Estate was in direct conflict with him being the attorney for the Aho Estate, since Mr. Kivisto was now free to pay himself anything he wanted in both the Aho and Johnson Estate with no one looking or asking any questions and there was no one to account to but himself. This is contemptible.

Because, there was not any funds in NY for Ms. Johnson and due to Mr. Kivisto antics both in the NY and Florida courts and since legal fees were becoming to costly, plus Ms. Johnson was now deceased, the Aho Estate was settled with payment to JASA in NY for JASA's commissions (which fees are turned over to the NYC Department of Social Services) and Miller Canfield's fees and payment to JASA's Florida counsel. While I am sure all attorneys have dealt with attorneys who are difficult, I have never encountered anyone as unethical, unscrupulous and malicious as Mr. Kivisto. Mr. Kivisto kept a simple Florida Estate matter going for over three years solely to increase his fees. Moreover, since he is now involved with both Estates and can sign any waiver he wants, neither the Florida court nor any one else will know what he does or how much he steals from both Estates. Additionally, I am sure that Mr. Kivisto will not turn over any funds from the Johnson Estate to NY Medicaid and therefore is committing a Medicaid fraud since Medicaid is the preferred creditor of Ms. Johnson's Estate.

I believe that this represents all of the relevant facts, but if there are any questions, I would be more then happy to answer them or supply any documents. As an aside, I have spoken with another Florida attorney on a different matter who told me she knew Mr. Kivisto and knew that he was a bad apple and was not surprised at my experience.

Part Three - Witnesses

JASA as guardian of Milja Johnson
Mr. Kivisto's client, Toini Wistbacka, and her husband
Hodgson Rosss, JASA's counsel in Florida
Judge Gange

KIVISTO LAW FIRM

J.K. Kivisto, Esq.

1010 Tenth Avenue North, Suite 2
E-Mail klfjk@aol.com
Lake Worth, FL 33460-2107
Phone (561) 588-5328
Fax (561) 588-5419

Hand Delivered

October 23, 2006

Ronna Friedman Young, Esq.
Bar Counsel
The Florida Bar
5900 North Andrews Ave. Suite 900
Ft. Lauderdale, FL 33309

RE: Complaint of Susan Robbins
The Florida Bar File No. 2006-50,163(15G)

Dear Ms. Young:

This responds to your letter of October 5, 2006.

SUMMARY OF MY POSITION

With respect to the attorney and personal representative fees we submit that the $7,500.00 personal representative fee was charged, paid, and agreed to by JASA in December 2003. The $10,500.00

attorney fee and costs were charged, paid, and agreed to by JASA in December 2003. The $30,000.00 attorney fee proposal of May, 2003 was not charged, paid or agreed to by JASA. No improper fees were charged on paid.

Throughout these proceedings I fulfilled by fiduciary and professional obligations to the beneficiaries of the Aho Estate, first to Milja Johnson, and after her death on 1/6/04 to the four Finnish intestate heirs of Milja Johnson. After the death of Milja Johnson in 1/6/04 Ms. Robbins took an adversarial position to the Johnson Estate and to the to the Finnish beneficiaries and became the *de facto* attorney of one of the creditors of the Johnson Estate, namely, N.Y. Medicaid.

Throughout these proceedings I represented honestly, diligently, and vigorously those whom I had an obligation to protect and represent, namely, Toini Wistbacka, the personal representative of the Aho Estate; Adrienne Gorman, the duly appointed guardian of the person and property of Milja Johnson; the Ward, Milja Johnson, the sole beneficiary of the Aho Estate, and upon her death on 1/6/04, the Ward's Finnish intestate beneficiaries, who then became the beneficiaries of the Aho Estate.

Throughout these proceedings the Florida Probate Court had exclusive jurisdiction over the Aho Estate, including determining who was the proper beneficiary to whom distribution should be made and determining the proper personal representative and attorney fees. To the extent that Judge Gangel-Jacobs

chose to participate in such determinations Judge Gangel-Jacobs was not acting as a judge over such matters but rather, was acting as an advocate. That is, Judge Gangel-Jacobs had no authority to compel the Aho Estate to make distribution, to compel the Aho Estate to settle the outstanding issues according to the wishes of Judge Gangel-Jacobs, or to determine the Aho Estate personal representative or attorney fees. Only the Florida Probate Judge, Judge Vonhof, could make those determinations.

On or about 9/12/02 JASA, represented by Ms. Robbins, filed a petition to have a successor guardian appointed for Ms. Johnson. Under New York, the appointment of a successor guardian to accept the distribution from the Aho Estate was a requirement, not an option. The Aho Estate had insisted upon this; JASA accepted the Aho Estate's position on 9/12/02.

The failure of Judge Gangel-Jacobs and Ms. Robbins to honor the settlement and to follow New York law caused the delay in the proper administration of the Aho Estate from 9/12/02.

JASA did not have authority under New York law to accept distribution from the Aho Estate. JASA, being a Community Program Guardian was required to file and did file a Petition for Discharge upon the Ward's being placed in a skilled nursing facility in July, 2000. Judge Gangel-Jacobs's order of 5/2003, stating that JASA's June 23, 2000 Commission was in full force and effect, was issued, on my suggestion to effectuate settlement after it became clear that JASA could not obtain a current, certified Commission. It was not that

I would not accept Judge Gangel-Jacobs word, as suggested in the Chronological Outline, it was that the Judge asked me what I wanted and I complied with her request. I wanted either a current, certified commission or an order saying that JASA's 2000 commission was in full force and effect. This is what the whole case was about. Subequently, I learned that JASA no longer qualified as guardian and that was the reason JASA could not obtain a current, certified commission..

Since we could not agree, in 5/2003, on the fees this matter was scheduled to go before Judge Vonhof on a Petition for Discharge. Neither Ms. Robbins nor Judge Gangel-Jacobs disclosed to me the reason why JASA could not obtain a current, certified commission.

I have re-read the Judicial Complaint, attached hereto. I adhere to that letter in all its respects.

In the Exhibit 11 in the Chronological Outline there is some confusion about the reason for the Judicial Complaint, especially in its suggestion that a threat of "surcharge" was the reason for the Complaint. Below is what I said in that respect. I had made clear in my letters and both Judge Gangel-Jacobs and Ms. Robbins understood my position, which is best summarized in the Judicial Complaint as follows:

On May 6, 2003 I returned Judge Phyllis Gangel-Jacob's telephone of even date to discuss the resolution of this matter. Correspondence concerning attempts to settle this matter are attached hereto as Exhibit D.

In our settlement conference call of May 30, 2003 Judge Phyllis Gangel-Jacob threatened to file a complaint against me with the Florida Bar, to appoint an attorney ad litem to investigate me, and demanded the telephone number of Judge Vonhof so she could complain to Judge Vonhof about my conduct unless the Estate acquiesced in her demands. The Estate has not so acquiesced, Judge Phyllis Gangel-Jacob's letter of May 30, 2003 not withstanding. (see Exhibit D) The Estate is proceeding as set out in the last paragraph of our letter of May 21, 2003. (Exhibit D) However, the Judge Phyllis Gangel-Jacobs veiled threat in the Court's letter of June 16, 2003 (see last entry of Exhibit D) to seek a surcharge against my client, Mrs. Wistbacka, for "recalcitrance" is the last straw. My client, Mrs. Wistbacka is in frail health and in her eighties. Ms. Robbins has put Mrs. Wistbacka through an ordeal by fire. The Estate will no longer accommodate the Court and will insist on the law being followed.

The fact of the matter is that Ms. Robbins client, JASA, being a community guardian program, by New York law does not qualify as the Guardian of the person and property of Milja Johnson--and has not qualified now for almost three years, since the fall of 2000. By statute JASA must be discharged forthwith and a new guardian must be appointed. Since September 13, 2002 Mrs. Wistbacka has been waiting for Judge Phyllis Gangel-Jacobs to appoint a guardian pursuant to the settlement set out in JASA Notice of Proposed Settlement filed September 13, 2002. (See Exhibit B). There is no getting around this

inconvenient fact. Vilifying me for having the audacity to point this out is hardly justice.

Milja Johnson is 100 years old. Milja Johnson has not had a guardian for almost three years--no visits, nobody to talk to. The only matter that concerns Judge Phyllis Gangel-Jacobs and Ms. Robbins is Milja Johnson's money. That money will go to fees and the Prospect Park Nursng Home and/or Medicaid. Mrs. Johnson is not suffering for lack of money; Mrs. Johnson is suffering for lack of a guardian such as Adrian Gorman. Prospect Park will be paid through a combination of the inheritance and/or Medicaid.

Also there is a suggestion that we did not make our position clear with respect to been provided with a current, certified commission. Here is what I wrote to Judge Gangel-Jacobs on June 18, 2002.

I spoke to Adrienne Gorman about the inheritance because both Ms. Robbins' client, JASA, and Ms. Gorman informed that Ms. Gorman had been appointed guardian and as requested Ms. Gorman promised to provide me with certified letters of guardianship once Ms. Gorman received them. When I requested that Ms. Robbins provide me with certified letters of guardianship, a request that I thought was eminently reasonable, Ms. Robbins essentially told me to take a hike. Ms. Robbins went as far as, without my permission, contacting my client, Toini Wistbacka, to complain about my intransigence. Rules just do not apply to Ms. Robbins, do they?

Although there may be no such animal in New York as "certified Letters of Guardianship" I would hazard a guess that there is such an animal as certified Commission or other certified document which the Guardian uses to marshal assets. Ms. Robbins knows what we mean when we request certified Letters of

Guardianship *viz.*, the New York equivalent thereof, whether that be a Commission or other document that the Clerk or Court certifies evidencing the guardian's authority to act and marshal assets. Just think what a Bank would do if a Guardian were to attempt close out the IP's account with an abrasive letter from Ms. Robbins rather than with court certified guardianship documents. The rule that I am referring to is that guardians must present certified documents not lectures from their attorneys.

I made the same points in my Motion to Intervene. Similarly I wrote in my letter of February 22, 2003 to Judge Gangel-Jacobs as follows:

For many months now we have requested that Ms. Robbins provide the Estate with certified documents (which we understand to be a certified commission) evidencing the authority of her client to act on behalf of Milja Johnson. Ms. Robbins' refusal to provide the Estate with such documents prompted our filing of the Motion to Intervene. However, even the filing of our Motion failed to achieve the desire result--certified documents.

Then Ms. Robbins pretended not to know that we required **current**, certified documents. This game

we did not play. We were aware that JASA had been appointed guardian; that JASA had petition for a discharge; that Adrienne Gorman had been appointed guardian, and then Ms. Solomon had been appointed guardian. We could follow Ms. Robbins's argument that JASA claimed to guardian. In our opinion the argument was not sound.

ARGUMENT

The reason that N.Y. Medicaid came up short in these probate proceedings is not because of medicaid fraud, conflict of interest, or violations of law or professional regulations but rather because Ms. Robbins, who had put herself as *de facto* attorney for N.Y. Medicaid, failed to give N.Y. Medicaid the proper legal advice.

The record shows that on June, 2004, within the three (3) statutory claim period, Ms. Robbins spoke to N.Y. Medicaid and Florida counsel about N.Y. Medicaid's filing of a claim with the Johnson Estate. N.Y. Medicaid filed no claim.

More importantly at the time that Ms. Robbins filed her bar Complaint in August of 2005 N.Y. Medicaid still had more than five (5) months to file for an extension of time to file its Claim. F.S. s. 733.702(3) provides that the Court can extend the time for filing claims "only upon grounds of fraud, estoppel, or insufficient notice of the claims period."

However after two years from the date of death of the decedent, in our case after 1/6/06, it is too late to

file for an extension of time to file a claim. F.S. s. 733.710, which the Florida Supreme Court has held is a statute of non-claim, not a statute of limitations, reads as follows:

733.710 Limitations on claims against estates.--

(1) Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent's estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.

(2) This section shall not apply to a creditor who has filed a claim pursuant to s. 733.702 within 2 years after the person's death, and whose claim has not been paid or otherwise disposed of pursuant to s. 733.705.

(3) This section shall not affect the lien of any duly recorded mortgage or security interest or the lien of any person in possession of personal property or the right to foreclose and enforce the mortgage or lien.

Since Ms. Robbins is convinced she sees Medicaid fraud one wonders why Ms. Robbins chose to file a bar complaint in August, 2005 and allege Medicaid fraud rather than having N.Y. Medicaid, under F.S. S 733.702(3), file a Petition for an Extension of Time to File Claim against the Johnson Estate and allege Medicaid fraud as the basis for the Petition-- given that fraud is one of the recognized grounds for the Court to extend the time to file claims.

Ms. Robbins still had 5 months before the two year non-claim period expired on 1/6/06

I submit the reason is that Ms. Robbins know full well that she can not make out a case of Medicaid fraud before a court of competent jurisdictions. That is to say, since there was no Medicaid fraud Ms. Robbins felt that Petition to Extend Time based upon fraud would fail before Judge Vonhof.

More importantly such proceedings before Judge Vonhof would have disclosed the reason why N.Y. Medicaid had not file a claim against the Johnson Estate, after receiving proper notice and after its having discussed the matter with Ms. Robbins in June, 2004. Ms. Robbins filed her bar complaint in August, 2005, more than a year after settling the matter and accepting her money, to cover up her failure properly to advise N.Y. Medicaid in June 2004. Otherwise we would have seen a Motion from N.Y. Medicaid to extend the time to file before the two year non-claim period had expired.

The Medicaid fraud issue could have and should have been decided by in an adversarial proceeding before Judge Vonhof in Florida rather than being dumped into the lap of the Florida Bar. If Ms. Robbins really believed that there was Medicaid fraud we would seen N.Y. Medicaid filing for an extension of time to file its claim. I have said before and I say it again that Ms. Robbins knows with legal certainty, as do we all, that there is no medicaid fraud here. Ms. Robbins has filed her bar complaint in bad faith.

With two national law firms aware of the facts, one practicing probate law in Florida, the making of two major legal blunders of this nature, [(a) failure timely to file claim; (b) failure timely to file for an extension to file a claim] is beyond belief.

Based upon the case law in Florida a motion to extend time based upon fraud would have failed. In the past two years I have attended 3 Medicaid seminars, all of which had components about Medicaid claims and probate proceedings. In 1997 appeared before 4th Circuit Court of Appeal on a case that dealt extensively with the failure to file timely claims, attached hereto.

I understand that it is my conduct not Ms. Robbins conduct that is before this committee. All this goes to the issue of Ms. Robbins' credibility.

Not until May 24, 2002 when Ms. Robbins called me did I learn that JASA claimed to be the legitimate guardian. At that time I was waiting to be presented with a current, certified Commission by Adrienne Gorman who had been appointed guardian of Milja Johnson, first as a standby guardian on 7/26/00 and as guardian on 10/31/01.

The position of the Aho Estate was that in order to be recognized by the Aho Estate as the guardian, JASA had to present current, certified commission. JASA was then and always remained unable to do. In Florida, if a guardian or a personal representative goes to a bank with Letters of Guardianship or Letters or Administration with a certification date more than 90 days old the Bank will not accept such documents as

valid. That is Bank policy. The Bank will not give out financial information and certainly will not close an account until the Bank receives current, certified documents. The Aho Estate was following a similar policy.

In my opinion Ms. Robbins had had Ms. Gorman improperly removed as guardian after Ms. Robbins had learned that Mrs. Johnson was the beneficiary of Mrs. Aho's $150,000.00 Florida estate. My solution was to bring the matter to the attention Judge Gangel-Jacobs and have Ms. Gorman reinstated as guardian. Ms. Gorman was social worker and the best person to take care of Mrs. Johnson.

I wrote in the June 23, 2003 N.Y. Judicial Complaint, attached, (2nd and 3rd paragraph on page 2) as follows:

My telephone records show that on January 18, 2002 I had three telephone conversations with Prospect Park totaling 18 minutes. I was informed by Prospect Park that Adrian Gorman was Milja Johnson's Guardian, having taken over from JASA. Prospect Park provided me with Adrian Gorman's telephone number. Subsequent thereto on January 18, 2002 I telephoned Adrian Gorman and I informed her about the inheritance.

My telephone records then show that on February 1, 2002 I telephoned JASA and spoke 8 minutes, to the best of my recollection, with Cecille

Hershkovitz. I informed JASA about the inheritance. JASA confirmed Adrian Gorman was the Guardian of Milja Johnson.

Relevant copies of the such phone records are attached. Consequently, I did not believe Ms. Robbins representations that Ms. Robbins did not know about the money in Florida when Ms. Robbins had Ms. Gorman removed.

As I wrote to Judge Gangel-Jacobs on July 11, 2002:

After my conversation with Ms. Robbins [telephone conversatin of 5/14/02] I contacted Ms. Gorman. Ms. Gorman told me that she was no longer the guardian but did not understand what had happened and did understand why she was no longer the guardian. This I found and find troubling.

Ms. Gorman's sentiments were reconfirmed to me in her letter of October 16, 2006, attached:

In addition, if you can see your way clear in probating Ms. Johnson's estate to provide me with reimbursement for the expenses itemized in my affidavit ($ 817.00), I would be extremely grateful. Since, as you know, I was removed as Ms. Johnson's guardian with neither warning nor explanation, it is not surprising that no one saw fit to honor my respect for payment.

There were two court orders ordering JASA to pay Ms. Gorman the $807.00, October 31, 2001 and March 15, 2002. Ms. Robbins and JASA violated both of

those court orders and closed out the guardianship without paying Ms. Gorman.

In November of 2001, not knowing that first JASA had been appointed Guardian and then Ms. Gorman had been appointed successor guardian and being aware that Ms. Johnson was incapacitated, I had decided that the Aho Estate, with my appearing on the Estate's behalf *pro haec vice*, would petition the New York Court to appoint a guardian for Mrs. Johnson.

See my letter of June 26, 2001 to Dr. Berjt, at Prospect Park Nursing home, attached, the last sentence of the first paragraph reads as follows:

"I understand that Mrs. Johnson does not have a guardian acting for her."

Therefore, the Aho Estate's Motion to Intervene and my Motion to Appear *Pro Haec Vice* was a firm signal to Ms. Robbins to straighten out the confusion or I would I would do it for her: Either have JASA provide the Aho Estate with a current certified Commission or have a successor guardian appointed who will provide the Aho Estate with a current certified Commission. Those are the only two options. Pick one. If you do not I shall do it for you. Judge Gangel-Jacobs orders of 2/2003 denying the Motion to Intervene and to Appear *Pro Haec Vice* had the effect of preventing the Aho Estate from beginning any proceedings for the appointment of a successor guardian in place of JASA. By 2/2003 this issue was already moot. These orders did not give Judge Gangel-Jacobs jurisdiction over the Aho Estate in any respect.

As it turned out Ms. Robbins picked the latter and we arrived at the September, 2002 Settlement wherein Ms. Robbins had JASA petition to have an successor guardian appointed. Ms. Robbins rejected my suggestion that Adrienne Gorman be reinstated as guardian.

Ms. Robbins time and effort entries for September, 2002 are as follows:

09/09/02	Attend Court	1.50	375.00
09/11/02	Draft, revise and proof Notice of Settlement, Order Settling Final Account and Appointment of a Successor Guardian; and Affirmation; prepare papers for service and filing	1.80	450.00

In fact, the Judge's fax of September 6, 2002 to me ends as follows:

The Court intends to move forward with this matter in the next two weeks. Please do not take any at this time regarding the estate of Mirjam Aho. You will be contacted as soon as possible regarding the court's decision.

I had brought this matter to a stage wherein an amicable settlement had been reach 9/11/02 with all parties protected. All that remained was for Judge Gangel-Jacobs and Ms. Robbins to honor the settlement

and Aho Estate would have been settled well before the end of 2002.

Unfortunately, Judge Gangel-Jacobs and Ms. Robbins, for reason never satisfactorily explained (other than the Judicial Assistant's remarks that it was too problematic) chose not to proceed with the 9/11/02 Settlement.

None of above facts are set out in the Ms. Robbins' allegations. We see allegations about 11/01, 5/03, 2/04, conflicts of interest, but not about the settlement of 9/11/02, about the second settlement reached in 12/03, and the final settlement reached in 7/04.

Therefore, I submit that the delay, after 9/11/02 in settling the Aho Estate lies with Judge Gangel-Jacobs and Ms. Robbins.

That is not to say that matters could not have been handled differently. Looking back at this unfortunate series of events stretching back to 2001 I am sure that all three have us, Ms. Robbins, Judge Gangel-Jacobs, and I feel this way. But what is done can not be undone.

This was a legal struggle among two lawyers and a N.Y. judge, unseemly at times, with Medicaid getting the short end of the stick. I fought for the lay people, Mrs.Johnson, Adrienne Gorman, M.A., C.S.W., Mrs. Wistbacka, and the four Finnish beneficiaries. By not succeeding in having Adrienne Gorman restored as Guardian, I failed Mrs. Johnson and Ms. Gorman.

However, I did not fail Mrs. Wistbacka or the Finnish beneficiaries, to which I now turn.

In September, 2002 I informed Mrs. Wistbacka the matter was settled and the she would be discharge by the end of the year. Before the telephone settlement conference of May 30, 2003 among Ms. Robbins, Judge Gange-Jacobs, and me I informed Mrs. Wistbacka I was confident the process would be over. In December 2003 I informed Mrs. Wistbacka the case was over. That's three strikes.

Much has been made of that unfortunate May 30, 2003 telephone conference. Unfortunately Judge Gangel-Jacobs lost her temper. I emphasize that in that conference and in her subsequent letters Judge Gangel-Jacobs was not presiding as a judge, but rather was as an advocate, co-counsel if you will, with Ms. Robbins, for JASA.

Acting as a judge and an advocate in the same matter is a conflict of interest and is improper. The conflict is even more egregious when the judge does not have jurisdiction over the matter upon which the judge is acting as both judge and advocate. Only Judge Vonhof in the Florida Court had the judicial authority to compel the Aho Estate to make distribution and to set personal representative and attorney fees.

Since Judge Gangel-Jacobs insisted on acting as judge and an advocate, using intemperate language in our 5/30/03 settlement conference and subsequent letters, wrongly representing in writing that I had agreed to her proposal set the record straight both in

New York, by way of the Judicial Complaint, and in Florida by way of additional pleadings and disclosed to Judge Vonhof on the record the problems encountered in the administration of the Aho Estate.

Let me give the committee an illustration of how a some judges deal with fees and how this matter should have been handled in by Judge Gangel Jacobs in May, 2003

In September 2005 Judge Vonhof appointed me as court appointed attorney in an incapacity case, the *Larsen* case. There were two competing Petitions for Guardian, one by the mother of the Ward; the other by the granddaughter of the Ward. After extensive litigation this case was finally decided in April 2006, after which time the attorneys submitted their fee invoices to the Court. Even though I was court appointed I took the lead in the litigation and did all the heavy lifting. I submitted a invoice for about $39,000.00; the attorney for the granddaughter, the prevailing petitioner, submitted an fee invoice for about $23,000.00; the attorney for the mother submitted a fee invoice of about $13,000.00.

I attach Judge Vonhof's letter to me of May 23, 2006 to show how Judge Vonhof handled my attorney fees and how he would have handled the $30,000.00 Aho Estate invoice in May, 2003. I also attach a letter to me of July 6, 2006 accepting my $29,400.00 compromise and my letter to Judge Vonhof of July 7, 2006 informing him of an amicable settlement.

I refer you to my letters of May 19, 2003 and May 21, 2003, attached, wherein I tried to reach an amicable compromise on all issues, including, the attorney and personal representative fees. I no more demanded or charged an excessive fee of $30,000.00 in May, 2003 than I demanded or charged an excessive fee of $39,000.00 than in the *Larsen* case in May, 2006 before Judge Vonhof. **If written words have any meaning, surely, it clear that what I insisted on was not $30,000.00 but a reasonable fee based on an hourly rate of $250.00 based upon the time I had devoted to this matter.** In my letter of May 19, 2003 I even went out of my way not to embarrass the judge by saying I told her what to put in the order. See my letter of October 7, 2003, to Jarrett E. Cooper, Esq. of Florida counsel wherein I write.

We feel that settlement conference of 5/30/03 was a set up. We do not intend to be set up a second time. Judge Gangel-Jacob's order of 5/30/03 was an accommodation that I granted the Court out of professional courtesy. The Judge called me on 5/6/03 and asked what kind of order I was prepared to accept. As an accommodation to the Court and in order to come to an amicable settlement I told the Judge to put the wording in the Order that the 6/23/00 Commission was in full force and effect. Imagine my surprise when the 5/30/03 Order reads that the 5/30/03 Order is a *sua sponte* order.

However, further legal research subsequent to 5/6/03 showed that JASA had ceased to qualify as guardian about two years ago--putting into questions the validity of the Order that I asked for in good faith

as a compromise. One would have thought that both Ms. Robbins and Judge Gangel-Jacob would have disclosed this to me. It became clear why Ms. Robbins is not able to provide a current certified Commission--a document we have been calling for since May 24, 2002.

I was justified in expecting a response from Judge Gangel-Jacobs and Ms. Robbins similar to the response I received from Judge Vonhof in the recent *Larsen* case.

It has been suggested, in the Chronological Outline that the Judge Gangel-Jacobs' compromise of May, 30, 2003 was an excellent suggestion. To that I say that a better suggestion was for the Judge to have appointed a successor guardian, as agreed, in September 2002, thereby ending this matter in 2002. Failing that, an excellent suggestion was a reasonable attorney fee based upon an hourly fee based upon the time I had spent on this matter. That was the basis of Ms. Robbins' fee. Another suggestion would have been to let the passions subside and try to settle again, as was done in December of 2003. It was the Judge's and Ms. Robbins' right to object; and, it was our right to take put the matter before Judge Vonhof, who had jurisdiction over the Estate, for resolution. Accepting the Judge's compromise would have resulted at tilting at windmills before Judge Vonhof, and those proceedings then would have been frivolous.

Ms. Robbins was billing at $240.00 an hour. I was billing at $250.00 an hour, as disclosed to Ms. Robbins. The issue with respect to my fees was whether Judge Gangel-Jacobs and Ms. Robbins would

agree to compensate me at $250.00 and hour for all the hours I had spent in the case. This was their call and both of them refused to do so.

I was on record saying that failing a settlement this matter would go before Judge Vonhof. Unless we reached a compromise in the interim, which I fully expected, this matter was headed for an evidentiary hearing before Judge Vonhof after Mrs. Wistbacka's return from North Carolina in the fall of 2003.

As I wrote in me last paragraph of my May 21, 2003.

We agree that Mrs. Johnson is a Ward of the Court. The Court has jurisdiction over Milja Johnson and all guardian matters in respect thereto. We respectfully request that the Court authorize the Settlement, authorize JASA's signing of the Receipt & Waiver as set forth in the Final Accounting, in the letter of May 19, 2003, and in this letter. If the Court has questions may I suggest a conference call among the Court, Ms. Robbins and me. **If the three of us can not reach an agreement we respectfully request that, pursuant to our telephone conversation of May 6, 2003, the Court issue and Order confirming that JASA's Certified Commission dated June 23, 2000 is in full force and effect. We can then file and serve the Petition for Discharge and have the Palm Beach County Court determine whatever issues are properly raised in response thereto.**

And as expected we did reach a compromise in December, 2003. The statutory basis for hourly fee rate is as follows:

733.6171 Compensation of attorney for the personal representative.--

(1) Attorneys for personal representatives shall be entitled to reasonable compensation payable from the estate assets **without court order.**

(2) The attorney, the personal representative, and persons bearing the impact of the compensation may agree to compensation determined in a different manner than provided in this section. **Compensation may also be determined in a different manner than provided in this section if the manner is disclosed to the parties bearing the impact of the compensation and if no objection is made as provided for in the Florida Probate Rules.**

After this side bar let me return to Mrs. Wistbacka's $7,500.00 fee and my $10,500.00 fee of November 16, 2001. Mrs. Wistbacka retained me June 21, 2001 as the attorney for the Estate. At that time Ms. Wistbacka was in her summer home in North Carolina and was not scheduled to return to Florida until October, 2001.

Prior to Mrs. Wistbacka's return to Florida on 7/10/01 the Court appointed Mrs. Wistbacka the Personal Representative and issued Letters of Administration to her.

I first met with Mrs. Wistbacka at her home on October 26, 2001 for the first time and, inter alia, discussed fees. Mrs. Wistbacka informed me that she had rendered substantial uncompensated services to

Mrs. Aho prior to her death and had a agreement with Mrs. Aho that Mrs. Wistbacka would be entitled to a personal representative's fee of $7,500.00. It was understood that Mrs. Johnson, the primary named personal representative, could not serve and that the alternate personal representative, Mrs. Wistbacka would have to serve. That is origin of the amount of Mrs. Wistbacka's $7,500.00 fee. That works out to be about a 5% commission. But rather than having her filed a claim with the estate for the excess over the standard 3% commission we went with the $7,500.00 or 5% as had been agreed.

Agreements of this nature based on services rendered are not uncommon; beneficiaries objecting to them is uncommon. Beneficiaries do have the right to object to any fee, including the standard 3% commission. However, the payment of fees during administration does not require the consent or approval of the beneficiaries. The beneficiary approval comes at the time the Final Accounting and Petition for Discharge are filed and served. Generally this is done on full Waiver Basis, wherein the Final Accounting is presented to the beneficiaries but not filed with the Court. The beneficiaries sign a Receipt and Full Waiver whish is filed with Court together with a Petition for Discharge.

The statutory basis for the Personal Representative fee is as follows:

733.617 Compensation of personal representative.--

(1) A personal representative shall be entitled to a commission payable from the estate assets **without court** order as compensation for ordinary services. The commission shall be based on the compensable value of the estate, which is the inventory value of the probate estate assets and the income earned by the estate during administration.
on.

The Statute deems a 3% commission to be reasonable but does not prevent the charging of a higher commission. Further, since Mrs. Wistbacka had an agreement with the decedent, we could justify the $7,500 fee under the s. 733.617(4)--dealing with banks charging different rates.

But more importantly, by November 16, 2001 I had decided that before we could close out the Estate the Estate would Petition the New York to have a guardian appointed for Mrs. Johnson who could lawfully accept the Estate distribution and consent to a discharge. I would appear *Pro Haec Vice*. On these facts the New York Court would ordinarily waive the requirement to retain local counsel. I have appeared before the Federal Court for the Southern District of Florida *pro haec vice* and the Court has waived the requirement to retain local counsel.

Consequently, in addition to the agreement, Mrs. Wistbacka was going to have extra ordinary services to further to justify the agreed upon $7,500.00. Therefore on November 16, 2001 I permitted Mrs. Wistbacka to pay herself the $7,500.00 pursuant to her agreement with the decedent, Mirjam Aho. In

addition on November 16, 2003 Mrs. Wistbacka paid a $10,500.00 retainer to my trust account for fees and costs. Up to this point I had advanced the costs of the administration. At that time Mrs. Johnson lacked capacity to given consent; at that time we were unaware of either JASA's or Ms. Gorman's appointment as guardians; and more, importantly, consent of any beneficiary was then required as a matter of law.

Given the proceedings to be commenced in New York I intended bill out my services on an hourly basis, rather than via the statutory rate. I disclosed the hourly billing method to Judge Gangel-Jacobs in our telephone conversation of May 6, 2003 and subsequently to Ms. Robbins. Judge Gangel-Jaacobs and Ms. Robbins objected to the hourly method as they objected to the $7,500.00 agreement for the personal representative fee.

At all times Mrs. Wistbacka relied on my good judgment. With respect to the administration of the Estate, including the PR fee the buck stops at my desk. I accept fully responsibility for all calls. I made the calls, including permitting the $7,500 payment to Mrs. Wistbacka. Mrs. Wistbacka requested payment; I permitted it.

In the settlement conference of May 30, 2003 among Ms. Robbins, Judge Gangel-Jacobs I brought to the Judge's attention that Mrs. Wistbacka had an agreement with the decedent to be paid a fee of $7,500.00. The Judge objected to the $7,500.00, as was her right.

After the failed settlement conference I telephoned Mrs. Wistbacka about the objection and the Judge's compromise. Mrs. Wistbacka rejected the offer as it applied to her, left for North Carolina for the 2003 summer, informing me that this matter would have to wait until she returned in the fall. Since the settlement had degenerated to to the point where the Judge was making personal attacks I thought it best to let this matter rest until cooler heads prevailed and if they did not, then to bring the matter before Judge Vonhof.

In our settlement negotiations will Mr. Cooper of HodgsonRuss in December, 2003 I brought to Mr. Cooper's attention that Mrs. Wistbacka had the $7,500.00 agreement with the decedent. Consequently we reached an agreement in writing on the fees in December 2003--$10,000.00 for attorney fees, $7,500.00 for personal representative fee, and $1,000.00 for costs.

Consequently, before JASA filed its Motion to Compel Distribution against the Estate after Mrs. Johnson's death, the whole matter including fees was settled in writing. In February, 2003 Mr. Cooper informed me about Mrs. Johnson's death and included a final accounting for Mrs. Wistbacka to sign, which accounting reflected JASA's consent to the payment of the both the $7,500.00 personal representative fee and a $10,000.00 attorney fees.

Finally in the Petition for Discharge with Final Accounting filed with Judge Vonhof's Court on June 3, 2004 and properly served on JASA and Florida counsel (with proof of service filed with the Court)

Mrs. Westlake's $7,500.00 agreement with the decedent was disclosed as follows:

> **The personal representative's fee has been set at $7,500.00 (5% of the gross epursuant to an understanding between the Personal Representative and the decedent. The amount involved in the estate, the time involved and the complexity of the issues; extraordinary services. F.S. s.733.617(3), (4) & (7). See Attorney Time & Effort, attached and incorporated herein**
>
> **The attorney fee has been set at $30,100.00: the amount involved in the estate, the time involved and the complexity of the issues; extraordinary services. F.S. s 733.6171(4) &(5) See Attorney Time & Effort, attached hereto and incorporated herein.**

Neither JASA nor Florida counsel filed objections to the Petition for Discharge or Final Accounting. At that time JASA had already filed its Motion to Compel against the Aho Estate in the Florida Court. The Aho Estate had responded with a detailed and well research Motion to Dismiss with Memorandum of Law. The matter was finally settled in July, 2004.

Beneficiaries have a right to object to fees in the final accounting but generally do not micro-manage the administration of the Estate with respect any fees or other expenses of administration. Certain actions do require Court approval and in those cases beneficiaries

are noticed and have a right to object. When banks are fiduciaries they do seek beneficiary approval to pay fiduciary or attorney fees or other expenses of administration. Such approvals are sought when accounting as sought to be approved by the Court. The same goes for non professional fiduciaries. As my resume indicates I spent 5 years as the general counsel of the First National Bank in Palm Beach and had occasion to follow the course of administration.

With respect to the alleged conflict we respond as follows. A conflict of interest has to be looked at in the concrete, not the abstract. A conflict of interest occurs when the fiduciary's interest, conflicts or may conflict, with the interest of the beneficiary to whom the fiduciary owes a fiduciary duty. The Estate and I owed a fiduciary duty to the beneficiaries of the Estate, Milja Johnson.

Under Florida law a guardian may serve as the personal representative of both an testate and an intestate estate. See F.S. s. 744.528 That principle would apply even if an attorney were both the guardian and the attorney for the guardian. Based upon these principle I submit that under Florida law an attorney for the personal representative of Estate A, subject to full disclosure and consent, may serve as the personal representative for Estate B, wherein the beneficiaries of Estate B, are the intestate heirs of the beneficiary of Estate A, and consent to the appointment..

The Finnish beneficiaries of the intestate Estate of Milja Johnson were also the contingent beneficiaries

under the Last Will and Testament of Mirjam Aho. I was in contact with the Finnish beneficiaries as early as June 2001. The Finnish beneficiaries were aware that when and if Mrs. Johnson, was in her late 90s passed away, the Finnish beneficiaries would take as heirs-at-law in the intestacy.

In fact on September 6, 2002 I spoke with Judge Gangel-Jacobs' Judicial Assistant, Debra Fisher, about the four Finnish contingent beneficiaries and faxed to the Judge the complete Florida Probate record--11 pages including the Will. Attached is the 9/6/02 fax. I informed Mrs. Wistbacka that the guardian issue had been settled by the NY Court's imminent appointing of a Guardian who qualified under New York law to accept the distribution of the Florida Estate. I also telephoned the Finnish beneficiaries in Finland.

Therefore the Finnish beneficiaries were kept in the loop through out the proceedings. When Mrs. Johnson died the Finnish beneficiaries wanted to move quickly. The Finnish beneficiaries had an absolute right to probate their aunt's estate and make Medicaid prove up their claim in the proceedings. The Finnish beneficiaries had a right to pick the attorney to be the personal representative of the Estate of Milja Johnson who would best protect their interests. The Finnish beneficiaries chose wisely. If there was a conflict, and I submit there was not, the Finnish beneficiaries waived.

The Chronological Outline suggests in its 2004 Motion to Compel Distribution that JASA alleged essentially that "that due to Kivisto's wrongdoing, he is in 'constructive possession' of guardianship property

and should be required to turn it over to JASA; he should not have probated the estate to circumvent JASA & Medicaid. This argument goes nowhere with Judge Vonhof in the Motion to Compel..

Because I would have asserted lack of standing the Chronological Outline seems to excuse Ms. Robbins', JASA's, and Florida counsel's failure to object to the jurisdiction of the Palm Beach Probate Court, over venue, or my acting as personal representative. Not objecting because I might object in turn? What would happen if a lawyer failed to file a claim because the other side would object. What kind of legal reasoning is this? Malpractice. When did my objections stop Ms. Robbins before? It did not stop JASA from filing its Motion to Compel.

All three were creditors to whom I had to give notice under Florida law. As creditors none lacked standing to file a claim, as creditors it is not clear whether they lacked standing to object to venue, jurisdiction, etc. Any one of them could have petitioned for administration in New York, and as NY executors could have objected to the administration taking place in Florida. The bottom line is that after proper notice they chose to do nothing. Rather than having this matter decided before Judge Vonhof in an adversarial proceeding Ms. Robbins dumped in into the lap of the Florida Bar.

There is no inherent conflict vis-à-vis the Finnish beneficiaries to whom the money belongs. There is an inherent conflict vis-à-vis N.Y. Medicaid. But I represented the Finnish beneficiaries not N.Y.

Medicaid. Ms. Robbins represented N.Y. Medicaid. I may not represent both the Estate and the Estate creditors. That would in fact be a conflict of interest. My obligation is to give the all reasonably ascertainable creditors notice of the requirement to file claims. That is all. That was done.

It is clear that Ms. Robbins is taking the side of Medicaid, an estate creditor, against Ms. Johnson's heirs. That is a conflict of interest. In the shoes of the Ward, now stand her intestate heirs.

The Finnish beneficiaries signed the appropriate consents to begin the administration and have singed the appropriate consents and receipts to close out the Estate. The four Receipts and Consent are attached. The Finnish beneficiaries knew what they were doing. The Finnish beneficiaries knew I was the attorney for the Estate of Mirjam Aho. As a matter of law I had to account to the Finnish beneficiaries--those who would bear the impact of the compensation--for both estates. The Finnish beneficiaries had an absolute right to demand such accountings. To say that I had to account myself is not a correct interpretation of the law.

When Mrs. Johnson passed away the Estate of Mirjam Aho had a legal and fiduciary obligation to the beneficiaries of the Estate of Milja Johnson. Prior to Mrs. Johnson's death Aho Estate had a fiduciary to the beneficiary of the Aho Estate, Mrs. Johnson; after Mrs. Johnson's death the Aho Estate had a fiduciary obligation to the beneficiaries of the Johnson Estate--the 4 Finnish beneficiaries. Although I was involved in both estates I did not then, nor do I know, see a

conflict. If there was a conflict the Finnish beneficiaries waived it. They had full knowledge of my dual roles.

More importantly, had the Finnish beneficiaries not appointed me personal representative of the Johnson Estate they would have received nothing. Ms. Robbins is crystal clear on that. Therefore to allege that I had a conflict of interest with the Finnish beneficiaries is somewhat patronizing. The Finnish beneficiaries are in effect being told

"You can't pick, Kivisto, the person you think best to get you your money, because, Ms. Robbins, who wants the money to go the the creditors, without proofs of claim, says Kivisto has a conflict. When there is money on the line people know what is in their best interest and who is looking out for them.

This matter was settled when one of Ms. Robbins senior partners, Geoffrey Chin, called me on 6/24/04 and the Johnson Estate agreed to pay the attorney fees of Mr. Chinn's firm and Florida counsel. I left for vacation in Finland and returned after the July 4th holiday, not returning until after the 3 month claims period had expired. At such time the lawyers took their money and ran, leaving N.Y. Medicaid to their own devices. Mr. Chinn specifically told me he was leaving N.Y. Medicaid in my hands. That he did.

After the our July, 2004 Settlement, such as it was, on September 17, 2004 I responded to JASA's Verified Petition and on October 4, 2004 I responded to Ms. Robbins Affirmation, both of which had been served on the Finnish beneficiaries. I responded as an

attorney on my own behalf, *pro se*, if will. No, I was not practicing law illegally.

In my view Ms. Robbins was trying to intimidate the Finnish beneficiaries from exercising their rights under Florida law. This is par for the course. Ms. Robbins has intimidated Adrienne Gorman, then Mrs. Wistbacka, and then the Finnish beneficiaries, the very people I have been looking out for. That's the difference between the two of us.

Sincerely,

//jk Kivisto//
J.K. Kivisto

cc: Susan Robbins, Esq.

KIVISTO LAW FIRM

J.K. Kivisto, Esq.

1010 Tenth Avenue North, Suite 2
E-Mail klfjk@aol.com
Lake Worth, FL 33460-2107
Phone (561) 588-5328
Fax (561) 588-5419

December 6, 2006

Ronna Friedman Young, Esq.
Bar Counsel
The Florida Bar
5900 North Andrews Ave. Suite 900
Ft. Lauderdale, FL 33309

RE: Complaint of Susan Robbins
The Florida Bar File No. 2006-50,163(15G)

Dear Ms. Young:

Thank you for your letter of December 1, 2006 informing me that the Medicaid fraud issue was off the table. Had we been so informed earlier our last response would have been different. I look forward to meeting with the Committee on January 31, 2007.

I have said that Miller, Canfield and Ms. Robbins Medicaid raised the Medicaid fraud issue knowing there was no Medicaid fraud here. That amounts to a fraud on this Committee. Ms. Robbins had the full backing of

her firm. On August 24, 2000 I demanded a retraction from the firm. Miller, Canfield declined the invitation. See attached letters.

With respect to the Aho Estate I have stated that my fee in that matter remained the $10,000.00 retainer that was collected in 11/16/01. The $500.00 went toward administration fees, filing, advertising, copies, postage, etc.

The Aho Estate was closed on full Waiver. Attached is the Amended Petition for Discharge signed by Mrs. Wistbacka on July 28, 2004. The Full Waiver was signed by me as the Personal Representative of the Estate of Milja Johnson as contemplated by the Letters of Administration, attached, and the initial agreement with JASA on 6/24/04, wherein I wrote "Agreed. I return [from Finland] on 7/6/04. You'll dismiss your motion to Compel. I'll dismiss all my pleadings and file and file [sic] a petition for discharge with full Waivers. [sic]

On or about 7/14/04 the Aho Estate distributed the sum of $130,500.00 to the Johnson Estate in full satisfaction of the inheritance. See copy of attached Aho Estate check signed by Toini Wistbacka dated 7/10/04. From the $130,500.00 amount the Johnson Estate paid $ 10,000.00 to Miller, Canfield and $14,323.61 to Hodgson, Russ, leaving $106,176.39. From that amount the Johnson Estate transferred $52,000.00 or $13,000.00 by wire transfer to each of the four Finnish beneficiaries on 10/21/05 in complete satisfaction of their claims. See attached wire transfer records. The balance of $54,176.39 the Johnson Estate

paid as costs of administration, personal representative fees, and attorney fees based upon a hourly rate for administration and litigation. This answers the $64,000.00 or $54,000.00 question, if you will. I assumed the risk of not waiting the full two year period of the statute of no claim. See F.S. section 733.710. These documents are submitted as a courtesy in a spirit of cooperation. The Finnish beneficiaries and I do not waive any rights thereby, including without limitation, rights based upon privacy, confidentiality, work product or attorney client privilege.

The Johnson Estate was closed on a full Waiver basis on November 10, 2005. What has been particularly galling in this matter is Ms. Robbins insistence that the Finnish beneficiaries received their inheritance by Medicaid fraud and at the same time feigning solicitude for the legal fees that I may charge the Finnish beneficiaries. To put it vulgarly "that's sucking wind and blowing at the same time".

I requested Mr. Gerb's recusal on the basis of Rule 3-3.4(4) as being "prejudiced or biased toward the respondent." That is the only explanation for the outline. The other explanation I thought of was failure to grasp the issues. I try not to underestimate my opponents. What tipped the balance in the favor of prejudice or bias was Mr. Gerb's attempt to leave a voice mail asking for documents. When Mr. Gerb realized that based upon the record, *viz.* the 11 Exhibits, he could not make out a case for excessive fees, (the Aho Estate distributed $130,500.00 to the Johnson Estate), Mr. Gerb demanded, after a six month investigation, to know what fees were charged the

Johnson Estate. If an investigator is going to allege excessive fees it is not asking too much for the investigator to first know what the fees are. Also, I became convinced that Mr. Gerb knew, as did Ms. Robbins, that the Medicaid allegation was sham from the beginning but insisted on carrying Ms. Robbins's water for reason not entirely clear at this time.

Therefore, the basis for recusal did not show itself until November 1, 2006. I responded promptly by letter of November 21, 2006, behind which I stand. However, I shall meet with the Committee as scheduled and answer their questions.

I trust you find this satisfactory.

Sincerely,

//jk kivisto

J.K. Kivisto
cc. Susan Robbins

Thy Will Be Undone

The case that shocked New York City offers lessons on how to protect your own estate.

by: Meryl Gordon | from: AARP The Magazine | July 2009

It had all the elements of a soap opera: a feuding family, huge wealth, scandalous allegations. Nine years ago New York City socialite and philanthropist Brooke Astor was diagnosed with Alzheimer's disease. Despite her condition, she signed off on major changes to her will—changes that benefited her only son, Anthony Marshall, now 85.

A year before Astor's death in 2007 at 105, Marshall's son Philip Marshall, now 56, asked a court to remove his father as his grandmother's guardian. The court named Susan Robbins, a specialist in guardianships and eldercare law in the Manhattan office of Miller Canfield, to represent Astor. Robbins came to believe that codicils to the will had been forged; at press time, the elder Marshall was facing grand larceny and conspiracy charges in New York State's Supreme Court. We asked Robbins about the case and ways to prevent estate fraud.

Q: What were the red flags for you in this case? Tony Marshall seemed to have abdicated his role as his mother's caretaker. He didn't really oversee what the nurses and housekeeping staff were doing. I looked at the files of Mrs. Astor's lawyer and saw changes to her

wills. Mrs. Astor was being more generous to Tony Marshall than she had been in the past.

Q: Was there a "eureka" moment that made you suspicious when you saw the codicils? Mrs. Astor's signature on her third codicil was almost perfect, but on prior codicils she had trouble writing her name.

Q: What are other ways you've seen older people exploited? In one case a priest had a parishioner sign over her house to him. He did this to other parishioners by isolating them and keeping them away from family and friends. I've also seen mortgage bankers get people to take out mortgages they can't afford, and the person gets evicted.

Q: Could Astor have protected herself better? Mrs. Astor did what people should do: give powers of attorney and a health care proxy and a living will to people you trust. It's also good to tell your wishes to as many people as possible. If Mrs. Astor had done that, maybe some of this could have been avoided. I know Tony Marshall is alleging that his mom had a change of heart and wanted to show her love for him. If this is true, and she had let more people know it, it would have given more credence to what happened later. But significant changes took place in her wills that had not happened before.

Meryl Gordon is the author of the bestselling Mrs. Astor Regrets *(Houghton Mifflin, 2008).*

The New York Times, November 27, 2007

Son of Astor Is Said to Face Criminal Case

Brooke Astor's only son and one of her former lawyers have been indicted on criminal charges stemming from the stewardship of her financial affairs and the handling of her will, according to people who were briefed on the situation.

Her son, Anthony D. Marshall, 83, and the lawyer, Francis X. Morrissey Jr., have been told to surrender to authorities today, those who were briefed said.

A Manhattan grand jury has been hearing evidence from witnesses since mid-September, following an investigation by the district attorney's office into, among other issues, the management of Mrs. Astor's fortune by Mr. Marshall as well as Mr. Morrissey's role in the signing of a third amendment to her 2002 will.

The exact charges against the two men, who have been partners in a theater production company, were not known.

Prosecutors were believed to be investigating millions of dollars in cash, property and stocks that Mr. Marshall obtained over the years in his role as steward of his mother's finances.

That included the sale of one of Mrs. Astor's favorite paintings, "Flags, Fifth Avenue," also known as "Up

the Avenue from Thirty-Fourth Street, May 1917," by Childe Hassam, for $10 million.

Mr. Marshall collected a $2 million fee from his mother for handling the transaction.

The prosecutors have been looking into whether these various transactions were in the best interest of Mrs. Astor or whether they were larcenous.

The district attorney's office was also informed by Mrs. Astor's court-appointed lawyer, who had retained a nationally known handwriting expert, that the signature on the third amendment, which was made in March 2004, was possibly forged. According to records and interviews, Mr. Morrissey was one of those present at the signing.

Investigators have also looked at an amendment made earlier that year that gave Mrs. Astor's residuary estate outright to Mr. Marshall and designated him as executor of the estate. By comparison, Mr. Marshall was to get 7 percent a year of the fair market value of the entire residuary under the original terms of his mother's 2002 will.

Mr. Morrissey's lawyer, Michael S. Ross, said yesterday that his client was out of the country and would surrender later in the week. "Mr. Morrissey vigorously denies having acted improperly and looks forward to his day in court," Mr. Ross said. He added that Mr. Morrissey "will plead not guilty at his arraignment."

Mr. Marshall did not return a call last night to his home in New York City.

Mrs. Astor, the philanthropist and society doyenne, died in August at age 105. Her estate is valued at about $132 million, in addition to a trust estimated to be worth more than $60 million.

The indictments mark the first time that criminal charges have been filed in a fractious legal battle concerning Mrs. Astor's well-being and fortune that began in July 2006.

That is when Mr. Marshall's son, Philip Marshall, 54, filed a petition in State Supreme Court accusing his father of neglecting Mrs. Astor's care while trying to enrich himself with her wealth. Last December, based on a court evaluator's report that has not been made public, a judge said that the claims of elder abuse were unsubstantiated.

Philip Marshall said yesterday that he had no comment on the criminal charges against his father or Mr. Morrissey.

The Manhattan district attorney's inquiry has lasted about a year, directed by Elizabeth Loewy, a prosecutor who leads the Elder Abuse Unit, which is part of the Special Prosecutions Bureau of the district attorney's office.

Prosecutors have been trying to determine, among other issues, whether Mrs. Astor was the target of undue influence related to millions of dollars in money

and property transfers in the last several years that benefited Mr. Marshall, who had his mother's power of attorney.

JPMorgan Chase, the court-appointed guardian of Mrs. Astor's assets, raised questions in a report last year about her mental competency in 2003. That year, Mrs. Astor signed documents transferring $3.4 million of her securities and her seaside Maine estate, valued at $5.5 million, to her son.

Mr. Marshall, in recent years, has also directed hundreds of thousands of dollars of her money to his theater production company and used $100,000 of her fortune to finance a charitable organization established by his wife, Charlene. Mr. Marshall has said that all of those transactions were made with the full approval of his mother.

The signature on the amended will has been one area of interest to prosecutors. According to interviews and records, several people attended the signing of the amended will in 2004. They were two of her aides and Mr. Morrissey, a lawyer with whom Mr. Marshall had a close working relationship at the time. The amendment stipulated that Mrs. Astor's real estate was to be sold upon her death and the proceeds added to her residuary estate.

For two years in the mid-1990s, Mr. Morrissey was suspended from practicing law in New York State for mishandling a client's escrow account.

After the family battle erupted, Mrs. Astor's former court-appointed lawyer, Susan I. Robbins, saw that the signature on the 2004 amendment was thicker and firmer than the ones on the two earlier amendments.

Ms. Robbins retained a handwriting expert who concluded that Mrs. Astor "could not have written the questioned 'Brooke Russell Astor' signature dated March 3, 2004, due to the deterioration of her ability to write her name." Ms. Robbins brought the findings to the district attorney.

Yesterday, the district attorney's office, which is expected to hold a news conference on the indictments today, declined to comment. One of Mr. Marshall's lawyers, Kenneth E. Warner, also declined to comment.

Any indictments will most likely further complicate settlement talks in Surrogate's Court in Westchester designed to resolve the dispute over Mrs. Astor's estate. The talks came to a halt in September at the request of the Manhattan district attorney's office, which was presenting evidence to the grand jury.

Subj: Re: jk kivisto
Date: 1/28/07 3:31:20 P.M. Eastern Standard Time
From: AGorman718
To: Klfjk

I will try to remember the details of the court hearing, but I do remember that it was agreed during the meeting with the judge that I was to be reimbursed at the rate of $100 an hour for certain services that I believe were spelled out at that time. I also remember having a pleasant, though somewhat cynical, conversation with Ms. Robbins afterward about the working of the court system in cases covered under Article 81, a law with which I had had a prior negative experience. It was sometime after this that Ms. Robbins, after asking me to do something, which I cannot now remember and in which i had no training, decided to remove me from the case, rather than simply explain how I might fulfill the request. I also have a dim memory that this required that I fill out and return to her a form which she submitted to me late and then used my delay as a reason to deny payment, but I could be mistaken about this. I will see if I have any records or can jog my memory in a more detailed manner, but at no time that I can remember was the issue of nonpayment a matter of lack of funds. Like you, I never understood her decision, which she never explained, despite numerous phone calls I made to her. And I have always appreciated your advocacy on my behalf over this question.

I have a new e-mail address, which I consult more frequently, though only on weekends since I use my

broadband for my job during the week: Agorman19@nyc.rr.com
Again, I thank you for your past support and will be in touch again as soon as I can recreate, through documents or memory, a more complete accounting of that episode.

Adrienne Gorman

Adrienne Gorman, M.A., C.S.W.
18 West 88th St
New York, NY 10024
(212) 362-5883

10/16/2005

Mr. J.K. Kivisto
Kivisto Law Firm
1010 Tenth Avenue North, Suite 2
Lake Worth, FL 33460-2107

Dear Mr. Kivisto:

As you requested, I am sending the name and phone number of Ms. Johnson's nephew, although I believe he was somewhat further removed from her than that relationship suggests. Gary Fischl told me he lived in San Jose but provided no address. Nor did he ever get in touch with me again. His phone number is (or was): (408) 377-2919.

In addition, if you can see your way clear in probating Ms. Johnson's estate to provide me with reimbursement for the expenses itemized in my affidavit ($817.00), I would be extremely grateful. Since, as you know, I was removed as Ms. Johnson's guardian with neither warning nor explanation, it is not surprising that no one saw fit to honor my request for payment.

If I can be of any further assistance, please feel free to get in touch with me.

Sincerely,

Adrienne Gorman

Susan I. Robbins
MILLER CANFIELD
1450 Broadway
41st Floor
New York, New York 10018

January 7, 2002

Ms. Cathy Raphael
Jewish Association for Services for the Aged
132 West 31st Street, 15th Floor
New York, New fork 10001

Re: In Re Milja Johnson

Dear Cathy:

Enclosed is a copy of Judge Gische's version of the order settling final account for Milja Johnson and order appointing a successor Guardian. As set forth in the order, please pay Miller Canfield and Adrienne Gorman the fees set forth in the order. I am not sure why, nor am I sure I am reading the order correctly, but I believe that JASA is meant to retain $5,040 for a "stand-by" guardianship account (see page 2 paragraph 3 of the order) and to turn over the balance of the funds to Ms. Gorman upon receipt of a certified copy of her commissions (see page 6 next to last paragraph). By copy of this letter to Ms. Gorman I am asking that she provide you with her certified commissions directly.

As you are aware, Miller Canfield is holding $15,000 of Ms. Johnson's funds. However, in order not to jeopardize her governmental benefits, I have not

enclosed our check unless you instruct me to the contrary. Once you are in receipt of Ms. Gorman's commissions I can send JASA the check or send the check directly to Ms. Gorman.

Once you are in receipt of the cancelled checks, please send them to me, along with the reconciliation, so that I can draft the final order discharging JASA. Thank you.

Sincerely,
Susan I. Robbins

IN THE CIRCUIT COURT FOR PALM BEACH
COUNTY, FLORIDA
PROBATE DIVISION
FILE NO. 502004CP000987XXXXSB

IN RE: ESTATE OF

MILJA JOHNSON
a/k/a Mitza Johnson
a/k/a Milja Wacklin

Deceased.
_____ ____/

LETTERS OF ADMINISTRATION
(Single Personal Representative)

TO WHOM IT MAY CONCERN

WHEREAS, Milja Johnson, a resident of the State of New York, died on January 6, 2004, owning assets in the State of Florida, and

WHEREAS, Jussi K. Kivisto has been appointed Personal Representative of the estate of the decedent and has performed all acts prerequisite to issuance of Letters of Administration in the estate,

NOW THEREFORE, I, the undersigned circuit judge, declare Jussi K. Kivisto to be duly qualified under the laws of the State of Florida to act as Personal Representative of the estate of Milja Johnson, with full power to administer the estate according to law; to ask, demand, sue for, recover and receive the property of

the decedent; including without limitation, to recover and receive the property of the decedent from the Estate of Mirjam Aho, File No. 2001 CP-003150 and to consent to close out said estate of Mirjam Aho according to law, and to enter all bank safety deposit boxes of the decedent and to recover and receive all property from therein, to pay the debts of the decedent as far as the assets of the estate will permit and the law directs; and to make distribution of the estate according to law.

WITNESS the hand and the seal of this Court this 6 day of April, 2004.

//Gary L. Vonhof//
Gary L. Vonhof, Circuit Court Judge

Copies to:

J.K. Kivisto, Esq.
1010 Tenth Ave. N. Suite 2
Lake Worth, FL 33460

6/11/204

The City of New York
Human Resources Administration
Office of Legal Affairs
Litigation Division
180 Water Street, 18th Floor
New York, New York 10038

BY FAX and REGULAR MAIL
(212) 704-4410
Susan Robbins, Esq.
Miller, Canfield, Paddock and Stone 1450 Broadway, 41st Floor
New York, New York 10018

Re: Milga Johnson
SSN: 131-12-0703
M.A. No. UF25829Y

Dear Susan:

Pursuant to your request, please be advised that Medicaid paid a total of $138,405.50 for the period May 8, 1998 through January 6, 2004 on behalf of the above-named individual. Pursuant to Social Services Law Section 104, the Department of Social Services is a preferred creditor against the estate for the amount of Medicaid provided.

Should you require a formal proof of claim, please so advise and one will be provided, Kindly keep me advised as to the status of proceedings and serve us with all legal papers.

As always, thank you for your courtesies.

Very truly yours,
Millicent D. Davis

MILLER CANFIELD
1450 Broadway
41st Floor
New York, New York 10018

To: Millicent Davis
Cc: Cecille Hershowitz

From: Susan I. Robbins

Date: July 22, 2004

Further to our telephone conversation, J. K. Kivisto is a Florida attorney who is the administrator of the Estate of Milja Johnson, who was JASA's client. Ms. Johnson died early this year in a nursing home in New York. There is a Medicaid claim of approximately 138,000, Ms. Johnson's niece I believe, Miriam Aho, died in Florida about three years ago leaving her entire estate of approximately $150,000 to Ms. Johnson, Mr. Kivisto is also the attomey for the Estate of Aho. For the last two years I have been fighting with Mr. Kavisto and even retained attorneys in Florida on behalf of Ms- Johnson. demanding that Mr. Kivisto turn over the funds to JASA. He never did and then Ms. Johnson died, Mr. Kivisto allegedly got Ms. Johnson's heirs in Finland to agree to allow him to administer Ms. Johnson's Estate, I have always told Mr. Kivisto that Ihere is a lame Medicaid claim and that there would not be any funds left over, Mr. Kivisto also wanted $30,000 for legal fees in the Aho Estate even though all he did was marshal four bank accounts (there is a Florida statute on legal fees in Estates)_ Mr. Kivisto also reported Judge Gangel, Jacob to the Judicial Committee, I sent Mr.

Kivisto the letter you recently sent nee showing Medicaid's claim. Enclosed is information I received from Mr. Kivisto regarding submitting claims against Ms. Johnson's Estate in ease the City wants to file a claim in Florida. If you have any questions, do not hesitate to contact. me and I will do my best to assist you.

No. SC07-2281
IN THE SUPREME COURT OF FLORIDA
The Florida Bar File
2006-50,163(15E)

The Florida Bar
v. Complainant

Jussi Kustaa Kivisto
Respondent

_____/

VERIFIED MOTION TO REASSIGN CASE, TO VACATE ORDERS and EMERGENCY MOTION FOR STAY

Petitioner, Jussi K. Kivisto, pursuant to § 38-10 Fla. Stat. (2007); the Rules Regulating the Fla. Bar; Fla. R. Jud. Admin. 2.330(j); and Article V, Section 3(b)(7) & Section 15, Florida Constitution Petitioner hereby moves this Court to Reassign Case, to vacate Judge Leroy H. Moe's Order For default Judgment against Respondent dated 10/30/08 and Order and Notice dated 11/2/08, both attached hereto. Pursuant to Fla. R. App. P. 9.310 and this Court's inherent powers to issue a stay, Petitioner files his Emergency Motion to Stay the proceedings before the Referee, pending review of this Motion.

1. On 10/6/08 Petitioner served Judge Moe with Kivisto's Amended Verified motion to Disqualify Referee, attached, by personally delivering the

Amended Verified motion to Judge Moe's legal assistant, Paula Lawler, on 10/6/08 as well as by regular mail. The Amended Verified Motion to Disqualify Referee is certified to have been served by hand delivery and by mail on 10/6/08. These facts are also set out in Emergency Petition for Writ of Prohibition and Emergency Motion for Stay, certified to have been served on 10/18/08, and Corrective Amendment to Emergency Petition for Writ of Prohibition and -Emergency Motion for Stay, certified to have been served on 10/19/08, currently pending before this Court. The Amended verified Motion to Disqualify Referee was also filed with this Court.

2. Because Judge Moe has been disqualified by operation of law this matter must be reassigned. Judge Moe has not ruled on Amended Verified Motion to Disqualify Referee within thirty (30) days of service viz, by November 5, 2008. Judge Moe was served on 10/6/08 by hand delivery. Fla. R. Jud. Admin. 2.330(j) specifically provides that a motion to disqualify must be ruled on immediately and no later than thirty (30) days after service. Rule 2.3300(j) also provides that disqualification results upon the failure to rule on the disqualification motion with 30 days of service of the motion "If not ruled on within 30 days of service, the motion shall be deemed granted and the moving party may seek an order from the court direction the clerk to reassign the case." Schisler v. State, 958 So. 2d 503, (Fla. 3d DCA 2007); Johnson v. State, 968 So. 2d 61 (Fla. 4th DCA 2007).

3. In Tableau Fine Art Group, Inc. v. Jacoboni, 853 So. 2d 299, 302-03 (Fla. 2003), this Court first imposed a bright-line 30 day rule on disqualification orders.

This Court also confirmed that the burden is on the court, not the litigants, to assure a determination within 30 days:

As an additional matter, this Court in [Fuster-Escalona v. Wisotsky, 781 So. 2d 1063 (Fla. 2001)] found that the lower court's focus on the petitioner's failure to request a hearing on the disqualification motion was inappropriate. While this court acknowledged that the petitioner should have requested a hearing to ensure that the trial court considered his motion, it noted that the rules did not require such a request to be made. Accordingly, this Court held that the failure of the of the trial judge to give an immediate ruling on the motion to disqualify violated rule 2.160. We agree with this reasoning.

Thus, based upon the reasoning of Fuser-Escalona and the history behind the enactment of the rule, we hold that a motion for judicial disqualification filed pursuant to Florida Rule of Judicial Administration 2.160 [now 2.330] must be ruled on within thirty days following its presentation to the court. We believe that thirty days gives the trial court sufficient time to determine the sufficiency of a motion. A litigant who files a motion for disqualification should not be required to file a petition for a writ of mandamus to compel a trial judge to provide a ruling on the motion.

4. Petitioner's Amended Verified Motion to Disqualify Referee was deemed granted, Petitioner submits, on 11/5/08, nunc pro tunc, 10/6/08. Judge Moe was deemed disqualified as of 10/6/08. Clearly, Judge Moe has no legal authority to conduct a Final Hearing on Sanctions on 11/10/08.

5. Subsequent the petitioner's presenting to Judge Moe Amended Verified Motion to Disqualify Referee on 10/6/08 the only authority Judge Moe had under the law was either to grant or deny the Amended Verified Motion to Disqualify. Not having ruled on the Amended Verified. Motion to Disqualify Referee Judge Moe had no legal authority to hold hearings, to enter Order for Default Judgment Against Respondent dated 10/30/08 and Order and Notice dated 11/2/08. Petitioner made this point to Judge Moe during his brief telephone participation in the hearing held on 10/20/08. The Order for Default Judgment Against Respondent dated 10/30/08 was drafted in its entirety by Michael David Soifer, Esq. one of the defendants in Kivisto v. Miller Canfield et al Case No. 08-61519-CIV-COOKE/BANDSTRA (the Federal RICO Complaint) filed in the U.S. District Court for the Southern District of Florida. This is obvious conflict of interest.

6. Currently there is pending before this Court Petition for All. Writs or Constitutional Writ of Prohibition, certified to have been served 9/25/08, to quash the Formal Complaint in its entirety. Petitioner submits a copy of the Petition attaching a copy of the Amended Federal RICO Complaint filed 10/14/08 for the convenience of the Court.

WHEREFORE, Petitioner respectfully requests that the Court reassign this case, vacate Judge Leroy H. Moe's Order For Default Judgment Against Respondent dated October 30, 2008 and Order and Notice dated November 2, 2008, and enter an Emergency Order of Stay.

Pursuant to the provisions of § § 92.52 and 92.525, Fla. Stat. (2007), I, Jussi K. Kivisto, declare under penalties of perjury of the State of Florida that I have read the foregoing. and the facts set forth therein are true.

***

s/J. Kivisto

November 6, 2008

No. SC07-2281
IN THE SUPREME COURT OF FLORIDA
The Florida Bar File
2006-50,163(15E)

The Florida Bar
v. Complainant

Jussi Kustaa Kivisto
Respondent

_____/

KIVISTO'S AMENDED VERIFIED MOTION TO DISQUALIFY REFEREE

Respondent, Jussi K. Kivisto, (Kivisto) pursuant to R. Regulating the Fla. Bar 7-7.6(c)(8) and Fla. R. Jud. Admin. 2.330 hereby moves for the disqualification of the Honorable Leroy H. Moe, Judge of the Circuit Court of the Seventeenth Judicial Circuit as Referee and for grounds states as follows:

1. That this Motion is timely pursuant to Fla. R. Jud. Admin. 2.330(e).

2. Kivisto fears that he will not receive a fair trial or hearing in this cause because of the prejudice and/or bias of Judge Moe toward Kivisto more particularly described below which show reasonable grounds that Kivisto has a reasonable belief and fear that Judge Moe is prejudiced and/or biased toward Kivisto in this cause.

3. On September 24, 2008 Kivisto filed Federal RJCO Complaint for Damages and Injunctive Relief, Kivisto v. Miller, Canfield et al Case No. 08-61519-CIV-COOKE/BANDSTRA (the Federal RICO Complaint) in the United States District Court for the Southern District of Florida.

4. As a result of his conduct in these proceedings Michael David Soifer, trial lawyer for the Complainant herein, is one of the seven defendants in the Federal RICO Complaint Accordingly, since Mr. Soifer will necessarily a material witness in the proceedings before the Referee. Kivisto moved to disqualify Mr. Soifer from conducting this trial.

5. Kivisto's Verified Amended Motion to Disqualify was filed with and heard by Judge Moe on 9/29/08. The factual basis for Mr. Soifer's disqualification is fully set forth in the Verified Motion to Disqualify and Federal RICO Complaint, attached to the Verified Motion and incorporated therein by reference.

6. At the beginning of the hearing on 9/29/08 Kivisto handed Judge Moe pleadings, inter alia, a copy of the Verified Amended Motion to Disqualify Attorney together with the Federal RICO Complaint and Notice of Hearing.

7. Judge Moe denied the Verified Motion to Disqualify Attorney. Judge Moe stated that he had read the Federal RICO Complaint and found it "frivolous." Towards the end of the hearing Mr. Soifer informed Judge Moe that a "Paula!" had called Mr. Soifer regarding this matter. Upon inquiry by Kivisto Mr.

Soifer informed that Paula was Judge Moe's Judicial Assistant. Finally, Kivisto overheard Judge Moe's putting into the record, (to the court reporter) sua sponte and sotto voce, statements that he continued to have an open mind in these proceedings or words to that affect.

8. The ex parte communications between Judge Moe's office and Mr. Soifer is troubling. Mr. Soifer's being on a first name basis with Judge Moe's JA indicates that this may not have been the first instance of such ex parte communication.

9. It is impossible for Judge Moe to have read the 44 page Federal RICO Complaint while Mr. Soifer was making his opening statements. Every count in the Federal RICO Complaint deals with a federal question currently there are no state law issues in the Federal RICO Complaint. Judge Moe is a state court judge not a federal court judge. Judge Moe, without having read the Federal RICO Complaint that was handed to him at the hearing, had no legal basis to conclude that Petitioner's Federal RICO Complaint was "frivolous". Judge Moe has already decided this case before any evidence or testimony has been presented.

10. With respect to RICO counts in the Federal RICO Complaint the Supreme Court has recently decided three RICO cases: Bridge v. Phoenix Bond & Indemnity Co., 128 S.Ct- 2131 (2008) (reasonable reliance); Wilkie v. Robbins, 127 S.Ct. 2588 (2007) (extortion vs. legitimate government power); Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006) (reasonable reliance) and remanded Mohawk Industries

v. William 05-465 to the 11th Circuit which decided the RICO claims in favor of the Plaintiff.

With respect to the violation of the rights counts in the Federal RICO Complaint the Supreme court will hear oral arguments this term on two similar fact situatons: Van de Camp v. Goldstein, 07-854 and Ashcroft v. lqbal 07-1015. There is nothing frivolous about the Federal RICO Complaint.

11. Florida law provides that the impartiality of a judge must be beyond question. This standard of impartiality cannot be remotely reached in light of naked bias and prejudice shown by the Judge Moe as outlined above.

Levine v. State of Florida, 650 So. 2d 666 (Fla. 4th DCA 1995); Gonzalez v. Goldstein. 663 So. 2d 1183 (Fla. 4th DCA 1994); Hayslip v. Douglas 400 So. 2d 553 (Fla. So. 2d 553 (Fla. 4th DCA 1981).

12. Canon 3E(l) of the Code of Judicial Conduct states that

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.

This provision compels disqualification here. If a party to a case has a reasonable belief that he or she cannot receive a fair trial on account of the bias of the judge, Section 38.10, Florida Statutes, compels the judge to proceed no further. The statute does not require the belief to be premised upon facts that are proven at trial

Instead, the judge must consider whether a party has stated a fear based on the facts alleged, not their truth or falsity. Rogers v. State, 630 So.2d 513, 515-16 (Fla. 1993). As noted above, Canon 3 in Florida's Code of Judicial Conduct mandates that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might be questioned....Furthermore, because Kivisto has a well-grounded fear that justice in this case may be overshadowed by the appearance of impropriety, Judge Moe's disqualification is necessary. Caleffe v. Vitale, 488 So.2d 627 (Fla. 4th DCA 1986).

13. Because it is the reasonableness of Kivisto's belief, and not the judge's own perception of his to act fairly that matters, Judge Moe need not agree with the facts on which Kivisto's fear is based. Caleffe, supra at 628. See also Superkids Bargain Store, Inc. v. Breakstone, 565 So.2d 1332,

In order to decide whether the motion is legally sufficient, at 1087:

[a] determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial.

The legal sufficiency of the motion is purely a question of law

16. Kivisto respectfully suggest that the reasonableness of Kivisto's fear that Kivisto will not receive a fair trial is underscored by the extraordinary nature of these proceedings and the federal and

constitutional issues raised in his Answer herein and as shown by the Federal RICO Complaint

Pursuant to the provisions of §§ 92.52 and 92.525, Fla. Stat. (2007), I, Jussi K. Kivisto, declare under penalties of perjury of the State of Florida that I have read the foregoing and the facts set forth therein are true.

s/ J. Kivisto

10/6/2008

Attorney Certification

Pursuant to Fla. R. Jud. Admin. 2.330(b)

I, J.K. Kivisto, Esq., as attorney for the Respondent Kivisto, hereby certify on this 6th day of October that Verified Amended Motion to Disqualify Referee and Kivisto's statements are made in good faith.

s/ J. Kivisto

10/6/2008

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAY 23 2011
OFFICE OF THE CLERK

No. 10-1327

IN THE

Supreme Court of the United States

JUSSI K. KIVISTO, PETITIONER

v.

THE FLORIDA BAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

SUPPLEMENTAL BRIEF

JUSSI K. KIVISTO
pro se

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TABLE OF CONTENTS

Page

SUPPLEMENTAL BRIEF 1

CONCLUSION 8

APPENDIX A: Decision of the Supreme Court of Florida (May 12, 2011 ..... 1sa

APPENDIX B: Petitioner Motion to Accept Brief as Timely Filed (June 26, 2010) 7sa

APPENDIX C: Petition for Mandamus (January 20, 2010) 9sa

APPENDIX D: Motion to Compel Production of Florida (March 9, 2011) 39sa

TABLE OF AUTHORITIES

Page

CASES

Bouie v. City of Columbia, 378 U.S. 347 (1964) 2

Cheney v. United States District for D.C., 542 U.S. 367 (2004) 6

Cohan v. Hurley, 366 U.S. 117 (1961) 6

Krupski v. Costa Crociere, 130 S.Ct. 1133 (2010) 2

NAACP v. Alabama ex. rel. Patterson, 357 U.S. 449 6

Morrison v. Olson, 487 U.S. 654 (1988) 3

United States v. Nixon, 418 U.S. 683 (1974) 5

SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Supreme Court Rule 15.8, Petitioner submits this supplemental brief, calling the Court's attention to the decision of the Supreme Court of Florida (FSC) issued May 12, 2011. (the 5/12/2011 Decision). Supp. App. 1sa-5sa

Ten months after Petitioner filed his Response to Order to Show Cause (Pet. App. 8a-24a), two weeks after the petition for writ of certiorari was docketed with this Court, and three days after the Respondent waived its right to respond to the petition the FSC issued the 5/12/11 Decision, in substance, defending the rulings Petitioner challenged in the petition for writ of certiorari. The FSC, in substance, states that the petition for writ of certiorari is meritless.

Certainly, a response in opposition from the Respondent would have to include more than similar *ipse dixits.*

Through out the proceedings below the FSC has permitted Respondent to skate by without filing responses to any of the three categories of writs filed by Petitioner as described in ¶ 5 of the Response to Order to Show Cause. Pet. App. 9a

It is time for the Respondent to engage.

The 5/12/11 Decision underscores that the FSC has permitted this matter to become personal, clouding its judgment to such an extent that the FSC has fallen into serious constitutional error. Far from dispelling the constitutional concerns set out in the petition for

certiorari the 5/12/11 Decision reinforces the compelling need for this Court to grant certiorari.

The FSC states that Petitioner "never filed a timely initial brief on the merits. Instead, he continued filing motions....in an attempt to delay...

A fair minded observer would conclude that Petitioner never filed his initial brief but, instead continued filing motions...in an attempt to delay... This conclusion, as the FSC knows, would be false.

Petitioner filed his brief three (3) days late, explaining to the FSC the reason for the late filing and requesting that, due to mistake, the brief be accepted as timely. [1] Supp. App. 6sa-8sa.

Respondent filed an answer to Petitioner's untimely brief; Petitioner filed a reply.

---

[1] Within the 35 day period Petitioner prior, to filing with this Court an application for a stay (09A1239) of the May 20, 2010 Order in which the FSC, *sua sponte*, suspended Petitioner from the practice of law, Petitioner filed for stay with the FSC. During this flurry of filings Petitioner became "locked" in the erroneous belief that his brief was due on June 28; the brief was due on June 24; Petitioner realized his mistake on June 25 when the brief was already late; but filed the brief requesting that the brief be accepted as timely. That Petitioner made the mistake is corroborated by his email to the clerks of this Court of June 22, 2010 wherein Petitioner states "my next pleading is not due until 35 days from 5/20/2010, that is, June 28, 2010. Supp. App. 6sa-8sa Petitioner cited *Krupski v. Costa Crociere*, 130 S.Ct. 1133 (2010) to the FSC in a subsequent filing. A mistake is mistake, not a failure to heed "the Court's direction".

On September 28, 2010, a week after Petitioner filed *Kivisto v. Soifer*, et al, 10-61758-UU (S.D.FL) (Kivisto II) (Pet. App. 18) the FSC, *sua sponte*, exercising its discretion, struck all the briefs and directed the clerk to treat the proceedings as uncontested. Pet. App 1a-2a

Regardless, the "untimely" filing issue is a red herring. Since the FSC had decided, *a priori*, without a response from Respondent, that Petitioner's arguments were "meritless", whether the arguments were included in a timely brief or a 3-day untimely brief is a distinction without a difference. To state that these arguments should have been included in a timely brief is disingenuous. [2]

Justice Robert Jackson warned, while serving as Attorney General, that the power to initiate proceedings poses the greatest danger to rights when "law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself." See *Morrison v. Olson*, 487 U.S. 654,728 (1988) (Scalia, J., dissenting) (quoting Robert Jackson, The Federal Prosecutor,

---

[2] Also on May 20, 2010 the FSC struck Sections I, II, and the Appendix from Petitioner's March 17, 2009 Petition for Review, effectively preventing Petitioner from making its "meritless" arguments in his initial brief. The FSC appears to have accepted Respondent's circular argument that since prosecutorial misconduct was not part of the record, Petitioner could not now put prosecutorial misconduct in the Petition for Review.

Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940.

As Justice Black, in dissent, stated in *Cohan v. Hurley*, 366 U.S. 117, 138, 148-149 (1961):

> The legal profession, with responsibilities as great as those placed upon any group in our society, must have that independence. If it is denied them, they are likely to become nothing more than parrots of the views of whatever group wields governmental power at the moment. Whenever that has happened in the world, the lawyer, as properly so called and respected, has ceased to perform the highest duty of his calling and has lost the affection even the respect of the people.
>
> .....
>
> For if the legal profession can, with the aid of those members of the profession who have become judges, exclude any member it wishes even though such exclusion could not be accomplished within the limits of the same kind of due process that is accorded to other people, how is any lawyer going to be able to take a position or defend a cause that is likely to incur the displeasure of the judges or whatever group of his fellow lawyers happens to have authority over him? The answer is that, in many cases, he is not going to be able to take such a position or to defend such a cause and the public will be deprived of just those legal services that, in the past, have given lawyers their most *bona fide* claim to greatness.

In note 3 of the 5/12/11 Decision the FSC refers to a Petitioner's petition for writ of mandamus which the FSC denied, without response from Respondent, on May 20, 2010. Supp. App. 9sa-38sa.

In its March, 2009 Rule 26 disclosures in *Kivisto v. MillerCanfield et al.* 08-61519-MGC (S.D.FL) (Kivisto I) (Pet App 18) Respondent's prosecutors, for the first time, admitted being in possession of Petitioner's Confidential File which they refused to produce. Since the Confidential File would show the circumstances of the Respondent prosecutors' fabrication of evidence Petitioner (unable to obtain the Confidential File in Kivisto I) filed with the FSC Motions to Compel. When the FSC failed to rule Petitioner filed a public records request with Respondent seeking the Confidential File. When Respondent denied Petitioner's public records request Petitioner appealed the denial to the FSC by way of a petition for writ of mandamus.

The Respondent refused to produce the Confidential File for the same reason that President Nixon stonewalled on the Watergate tapes. As this Court stated in *United States v. Nixon*, 418 U.S. 683, 709 (1974):

> The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defence.

The hurdles for mandamus under Florida law are the same as they are under federal law. As Justice Kennedy, delivering the opinion of this Court, stated in *Cheney v. United States District for D.C.* 542 U.S. 367 (2004) hurdles in mandamus, "however demanding, are not insuperable". See also *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449 (1958); *Bouie v. City of Columbia*, 378 U.S. 347 (1964)

Petitioner's March 9, 2011 Motion to Compel Production Pursuant to Rule 45 Subpoena filed in Kivisto II makes a compelling case that the crime-fraud exception vitiates Respondent's claims for privilege and confidentiality. Supp. App. 39sa-47sa

Why the Respondent is exempt from the disinfectant properties of sunlight remains a mystery.

The 5/12/11 Decision effectively prevents any future Leon Jaworski from raising the corruption of the judicial process before the FSC. If and when Petitioner obtains possession of the Confidential File in federal proceedings showing the corruption of the judicial process no Florida licenced attorney will risk the wrath of the FSC or Respondent by submitting the documents before the FSC. The chilling effect of the 5/12/11 Decision on Petitioner's First Amendment right of access to the courts is constitutionally intolerable and reinforces the compelling need for this Court to grant certiorari.

This proceeding forms part of a trilogy. In Kivisto I Petitioner's petition for writ of certiorari is due on July 5, 2011 with this Court; in Kivisto II Petitioner's appeal brief to the Eleventh Circuit is due

on June 2, 2011. Since Kivisto II has a ruling on prosecutorial immunity Kivisto II will come before this Court, regardless of the outcome. Ideally all three petitions should be considered by this Court as a whole at the same time.

This Court should grant certiorari to remedy and deter the oppressive government conduct set out in the petition for certiorari—which, significantly, both violates and chills the future exercise of fundamental constitutional rights.

The deterrence interest is especially strong where, as in this case, the wrongful conduct will, if left unremedied, chill the future exercise of rights by similarly situated attorneys other than the Petitioner. Petitioner threatened powerful corporate law firm interests simply by probating for his foreign clients an estate in Florida when the corporate law firm, stating that the claims exceeded the assets, told him not to.

The FSC decisions, by permitting powerful corporate law firms to use state bar disciplinary procedures to advance their commercial interests, render Petitioner and other attorneys who may be unpopular with state bar officials less secure of their rights because it denies them a means to deter abuses of the judicial system.

This Court's review is necessary to restore public confidence in the judicial process.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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lsa

SUPREME COURT OF FLORIDA

No. SC07-2281

THE FLORIDA BAR, Complainant,

vs.

JUSSI KUSTAA KIVISTO, Respondent.

[May 12, 2011]

PER CURIAM.

Jussi Kustaa Kivisto was the subject of a Florida Bar disciplinary proceeding.1 On March 17, 2009, Kivisto filed a petition for review of a referee's report that recommended he be disbarred. During the course of the proceedings, Kivisto filed numerous motions and writ petitions. In fact, in this matter, Kivisto submitted over 120 filings with this Court, the bulk of which were repetitive and meritless. In addition, despite the fact that it was Kivisto who sought review of the referee's report and recommendation, he failed to timely file an initial brief on the merits. On May 20, 2010, the Court issued an order specifically informing Kivisto that no further extensions of time would be granted for him to file an initial brief on the merits and ordering him to file his initial brief on the merits within thirty-five days or his petition for review could be subject to dismissal. See Fla. Bar v. Kivisto, No. SC07-2281 (Fla. May 20, 2010); see also Fla. R. App. P. 9.410 (Sanctions). Despite this clear warning, Kivisto failed to heed the Court's direction, and never filed a timely initial brief on the merits. Instead, he continued filing motions to toll,

motions to stay, an amended motion to stay, requests for oral argument, unauthorized requests, and other pleadings, in an attempt to delay the progress of his disciplinary case.2 The volume of repetitive and meritless filings, coupled with Kivisto's failure to proceed with his case by filing his initial brief, is an abuse of the Court's limited resources.3

Because of his repetitive and meritless filings, on July 9, 2010, this Court ordered Kivisto to show cause why the Court should not direct the Clerk of the Court to "reject for filing any future pleadings, petitions, motions, letters, documents, or other filings" submitted by him to the Court unless signed by a member of The Florida Bar other than Kivisto. See Fla. Bar v. Kivisto, No. SC07-2281 (Fla. July 9, 2010). In his response to the order, Kivisto continued to present arguments regarding the disciplinary case, which should have been included in a timely filed initial brief. Further, Kivisto challenged the Court's denials of his previous filings. Kivisto has failed to show good cause why sanctions should not be imposed for his numerous repetitive filings. We now sanction him.

Both this Court and the United States Supreme Court have, when deemed necessary, exercised the inherent judicial authority to sanction an abusive litigant. See, e.g., Martin v. D.C. Court of Appeals, 506 U.S. 1 (1992); In re Sindram, 498 U.S. 177 (1991); In re McDonald, 489 U.S. 180 (1989); Fla. Bd. of Bar Exam'rs re Ramos, 17 So. 3d 268 (Fla. 2009); Fla. Bar v. Thompson, 979 So. 2d 917 (Fla. 2008); Hamilton v. State, 945 So. 2d 1121 (Fla. 2006); May v. Barthet, 934 So. 2d 1184 (Fla. 2006); Sibley v. Fla. Judicial Qualifications Comm'n, 973 So. 2d 425 (Fla. 2006). The need for such a sanction lies in the

protection of the rights of others to timely review of their legitimate filings. See Martin, 506 U.S. at 3 (imposing sanction where petitioner's filings for certiorari review had a deleterious effect on the Court's fair allocation of judicial resources); Sibley, 973 So. 2d at 426. The resources of our court system are finite and must be reserved for the resolution of genuine disputes. See Peterson v. State, 817 So. 2d 838, 840 (Fla. 2002). As noted by the United States Supreme Court, "Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice." In re McDonald, 489 U.S. at 184.

After considering Kivisto's response to the order to show cause, we conclude that he has abused this Court's processes by filing a multitude of petitions and motions that repeatedly present the same unwarranted arguments. Kivisto's actions create a drain on the Court's limited time, for with each filing the Court must review and consider his repetitious and meritless arguments. Therefore, we conclude that a limitation on Kivisto's ability to file in this Court would further the constitutional right of access because it would permit the Court to devote its finite resources to the consideration of legitimate claims filed by others.

Accordingly, in order to preserve the right of access for all litigants and promote the interests of justice, the Clerk of this Court is hereby instructed to reject for filing any future pleadings, petitions, motions, letters, notices, or other filings submitted by Jussi Kustaa Kivisto that challenge the disciplinary proceedings

considered by this Court in Florida Bar v. Kivisto, 49 So. 3d 747 (Fla. 2010), or are related to his potential readmission to The Florida Bar, unless the filings are signed by a member in good standing of The Florida Bar.

Under the sanction herein imposed, Kivisto is not being denied access to the courts; that access is simply being limited due to his abusiveness. Kivisto remains eligible to seek readmission to The Florida Bar, once he has completed the five year period of disbarment, with the requirement that the filings are signed by a member in good standing of The Florida Bar. However, we cannot tolerate Kivisto's continued inability to abide by the legal processes of the judicial system. If Kivisto submits a filing in violation of this order, he may be subjected to contempt proceedings or other appropriate sanctions, including permanent disbarment. See R. Regulating Fla. Bar 3-5.1(f)("Permanent disbarment shall preclude readmission.")

It is so ordered.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

Original Proceeding – The Florida Bar

John F. Harkness, Jr., Executive Director, and Kenneth Lawrence Marvin, Director of Lawyer Regulation, The Florida Bar, Tallahassee, Florida, and

Michael David Soifer, Bar Counsel, The Florida Bar, Sunrise, Florida, for Complainant

Jussi Kustaa Kivisto, pro se, Lake Worth, Florida, for Respondent

Footnotes

1. We have jurisdiction. See art. V, § 15, Fla. Const.

2. In the disciplinary case, the Court approved the report of referee and disbarred Kivisto. See Fla. Bar v. Kivisto, 49 So. 3d 747 (Fla. 2010).

3. Kivisto's filings include four petitions for all writs, six petitions for writs of prohibition, a petition for writ of mandamus, as well as filings vaguely titled "emergency petition for writ." He has repeatedly filed amended versions of the writ petitions. Further, Kivisto has submitted unauthorized filings and filed at least five motions for rehearing regarding the writ petitions and other motions. These filings have not resulted in relief for Kivisto.

SUPREME COURT OF FLORIDA

No. SC07-2281

THE FLORIDA BAR, Complainant,

vs.

JUSSI KUSTAA KIVISTO, Respondent.

MOTION TO ACCEPT BRIEF IN SUPPORT OF PETITION FOR REVIEW AS TIMELY FILED

Respondent respectfully requests this Court to accept as timely filed, Respondent's Brief in Support of Petition for Review, due on June 24, 2010, on the ground of fundamental mistake by Respondent as set out in the attached emails.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular mail to Karusha Y Sharpe, Esq., Greenberg Traurig, 101 East College Ave., Tallahassee, FL 32301; . Michael David Soifer, Esq., Bar Counsel, The Florida Bar, 5900 North Andrews Ave., Suite 900, Fort Lauderdale, FL 33309; Kenneth Lawrence Marvin, Esq., Staff Counsel, and The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399, this 26th day of June, 2010.

Jussi K. Kivisto, Pro Se
1010 Tenth Avenue North, Suite 2
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Phone: (561) 588-5328;
Fax: (561) 588-5419
E-mail:klfjk@aol.com

Subj: Brief in Support SC07-2281
Date: 6/25/2010 2:47:47 P.M. Eastern Daylight Time
From: Klfk@aol.com
To: hall@flcourts.org
CC: msoiferzz@flabar.org , kmarvin@flabar.org

6/25/2010

Gentlemen:

I just realized that I had calculated 35 days from May 20, 2010 to end this Saturday, June 26, 2010. How I managed mistake like this is beyond me. But I did make the mistake. I counted it on the calendar several times and marked it on the calendar. By not counting the last two days of May on the calendar I had 30 days ending June 21, 2010. I made the same mistake over and over. The deadline ended yesterday, June 24, 2010.

My plan was to send the Brief tomorrow by Fedex. I shall finish the brief, send it tomorrow by Fedex and let the Court decide whether to accept or it or not.

JK Kivisto

Subj: Application (09A1239) for a stay-Justice Thomas
Date:6/22/2010 8:54:46 A.M. Eastern Daylight Time
From: Klfjk@aol.com
To: dbickell@supremecourt.gov,
cjrapp@supremecourt.gov
CC: cvasil@supremecourt.gov

According the last entries in docket sheet, below, FSC denied the my last request for a stay. According to the May 20, 2010 Final Judgment that I am seeking to have reviewed by certiorari, Exhibit A of the Appendix, my next pleading is not due until 35 days from 5/20/2010, that is June 28, 2010.

The Application is not moot. I do not think the Application will be moot after 6/28/2010.

IN THE SUPREME COURT OF FLORIDA

Supreme Court Case
No. SC07-2281

The Florida Bar File
2006-50,163(15E)

Jussi Kustaa Kivisto
Petitioner

v.

The Florida Bar
Respondent

PETITION FOR MANDAMUS AND/OR OTHER EXTRAORDINARY RELIEF

J.K. Kivisto, Esq.
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1/20/2010

TABLE OF CONTENTS

IA. TABLE OF CITATIONS iii

I. STATEMENT OF JURISDICTION 1

II REQUEST FOR ORAL ARGUMENT 1

III. STATEMENT OF FACTS AND OF THE CASE 2

IV. SUMMARY OF ARGUMENT 3

V. ARGUMENT 3

As administrative head of the Florida Bar, this Court should not abdicate its duty to supervise the Bar. This Court, in the exercise of its supervisory authority over The Florida Bar under Article V, § 15, Florida Constitution, and under the Fourteenth Amendment to the United States Constitution should compel the Florida Bar to produce the "Privileged Portions of Petitioner's Bar Disciplinary File".

VI. CONCLUSION 18

VI. CERTIFICATE OF SERVICE 19

VII. CERTIFICATES OF COMPLIANCE 19

VIII. APPENDIX

IA. TABLE OF CITATIONS

CASES

Cuevas v. Kelly 7
873 So. 2d 367 (2nd DCA 2004)

Liberty Counsel v. TFB Board of Governors 3
12 So.3d 183, (Fla. 2009).

Morales v. Iasis Health Care 15
901 So.2d 965 (Fla. 2nd DCA 2005)

Pastor v. Pastor 7
929 So.2d 576 (4th DCA 2006) and

United States v. Nixon 9
418 U.S. 683, 709 (1974)

OTHER AUTHORITIES

Fla.R.App. 9.030(a) (3) 1

Fla. R. Jud. Admin. 2.420 1

R. Regulating the Fla. Bar 1-14.1(a) 1,4, 9

R. Regulating the Fla. Bar 3-3.1 1

R. Regulating the Fla. Bar 3-7.1(b) 4, 9

R. Regulating the Fla. Bar 3-7.4(h) 4

R. Regulating the Fla. Bar 3-7.6(l) 17

R. Regulating the Fla. Bar 3-7.7(e) 1

R. Regulating the Fla. Bar 3-7.7(f)	1
Amend 14, § 1, U.S. Const.	3,18
Article I, § 24, Fla. Const.	1
Article V, §§ 3(b)(7) Fla. Const.	1
Article V, § 15 Fla. Const.	1,3,18
18 U.S.C. § 241	9
18 U.S.C. § 242	9

IN THE SUPREME COURT OF FLORIDA

Supreme Court Case
No. SC07-2281

The Florida Bar File
2006-50,163(15E)

Jussi Kustaa Kivisto
Petitioner
v.

The Florida Bar
Respondent

PETITION FOR MANDAMUS AND/OR OTHER EXTRAORDINARY RELIEF

Petitioner, Jussi K. Kivisto, files his Petition for Mandamus and/or Other Extraordinary Relief to

Compel the Florida Bar (TFB) to produce the "Privileged Portions of Petitioner's Bar Disciplinary File" as set forth below.

I. STATEMENT OF JURISDICTION

This Court has original jurisdiction to issue mandamus under Article I, § 24, Article V, §§ 3(b)(7) & 15, Florida Constitution; R. Regulating the Fla. Bar 1-14.1(a); 3-3.1; 3-7.7(e)&(f); Fla. R. Jud. Admin. 2.420; and, Fla.R.App. 9.030(a) (3). Article V, Section 15, of the Florida Constitution vests this Court with the exclusive authority to regulate the admissions of persons to the practice of law and the discipline of persons admitted.

II. REQUEST FOR ORAL ARGUMENT

Petitioner requests oral argument on this Petition.

III. STATEMENT OF THE FACTS AND OF THE CASE

1. On or about 10/19/09 Petitioner filed a Public Records Request with the Florida Bar; on 10/22/09 Petitioner filed with this Court Motion to Stay Proceedings and all Deadlines Therein; Request to Toll Time; Request for Oral Argument; and, Notice of Filing Public Records Request, (Exhibit A) which Motion to Stay and Request to Toll Time are specifically incorporated herein by reference and renewed herein.

2. Petitioner hereby incorporates herein by reference all pleadings, transcripts, and documents

filed with this Court in these proceedings, Case No. SC07-2281.

3. Petitioner's 10/19/09 Public Records Request had requested the TFB to produce the following documents:

> "Privileged Portions of Plaintiff's Bar Disciplinary File" as set out and described in Plaintiff's First Request to Produce to Defendants Michael David Soifer and Kenneth Lawrence Marvin, certified to have been served June 2, 2009, (Exhibit A) and Bar Defendants' Rule 26 Disclosures, certified to have been served March 23, 2009, (Exhibit B) in the federal civil RICO lawsuit (against *inter alia*, Michael David Soifer and Kenneth Lawrence Marvin) entitled *Kivisto v. Miller Canfield et al.*, Case No. 08-61519-CIV-Cooke/Bandstra, pending in the United States District Court for the Southern District of Florida.

4. By email of 1/5/2010 George Rudge, Records Manager of the Florida Bar, denied the request to produce "Privileged Portions of Petitioner's Bar Disciplinary File". Exhibit B.

IV. SUMMARY OF ARGUMENT

5. As administrative head of the Florida Bar, this Court should not abdicate its duty to supervise the Bar. This Court, in the exercise of its supervisory authority over The Florida Bar under Article V, § 15, Florida Constitution, and under the Fourteenth Amendment to the United States Constitution should compel the Florida Bar to produce

the "Privileged Portions of Petitioner's Bar Disciplinary File" as set our herein.

V. ARGUMENT

6. The Florida Bar is "an official arm of the court." R. Regulating Fla. Bar, ch. 1, Intro. Indeed, the Board's actions are "subject always to the direction and supervision of the Supreme Court of Florida." R. Regulating Fla. Bar 1-4.2(a). Therefore, as the administrative head of the Bar, this Court not only has the authority, but the duty, to require the Bar to follow its own bylaws and policies.

Every day, the Bar holds attorneys accountable for their actions in compliance with the rules of The Florida Bar. See generally R. Regulating Fla. Bar 3-3.1 (designating the Bar as an agency of this Court for the purpose of enforcing the rules of conduct for attorneys). When these rules are not complied with, there are disciplinary consequences to the lawyers. See R. Regulating Fla. Bar 3-5.1 (listing the disciplinary consequences to lawyers who are found guilty of violating the rules). It is not too much to ask for the Bar to comply with its own requirements when we expect lawyers to comply with the requirements of the Bar. See R. Regulating Fla. Bar 1-11.1 (explaining that the Bar's bylaws "govern the method and manner by which the requirements" of the Bar's rules are met).[1]

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[1] Justice Polston's dissent, joined in by Justice Canady, in *Liberty Counsel v. TFB Board of Governors, et.*al 12 So.3d 183, 196 (Fla. 2009).

7. R. Regulating the Fla. Bar 1-14.1(a) provides:

> (a) **Confidential Records.** All records specifically designated confidential by court rules, the Florida or United States Constitution, statutes, attorney work product, and attorney-client communications shall be confidential. In the event that The Florida Bar objects to production, these records shall not be produced without order of the Supreme Court of Florida or some person designated by the supreme court to decide whether the records should be disclosed.

8. R. Regulating the Fla. Bar 3-7.1(b) provides:

> (b) **Public Record.** The public record shall consist of the record before a grievance committee, the record before a referee, the record before the Supreme Court of Florida, and any reports, correspondence, papers, recordings, and/or transcripts of hearings furnished to, served on, or received from the **respondent or the complainant.**

9. R. Regulating the Fla. Bar 3-7.4(h) provides:

> (h) **Rights and Responsibilities of the Respondent.** The respondent may be required to testify and to produce evidence as any other witness unless the respondent claims a privilege or right properly available to the respondent

under applicable federal or state law. The respondent may be accompanied by counsel. At a reasonable time before any finding of probable cause or minor misconduct is made, the respondent shall be advised of the conduct that is being investigated and the rules that may have been violated. The respondent shall be provided with all materials considered by the committee and shall be given an opportunity to make a written statement, sworn or unsworn, explaining, refuting, or admitting the alleged misconduct.

10. ¶ 38 of TFB Complaint states:

38. The motion to compel distribution was eventually settled with respondent agreeing to accept $10,500.00 in attorneys fees for his work on the Aho Estate.

11. At the 11/10/08 hearing Mr. Soifer represented to the Court: (page page 31 of the transcript)

17 He [Kivisto] forced JASA to hire an attorney down
18 here. Thus, costing the estate more money in
19 attorney's fees, to file that motion to
20 compel distribution before he finally agreed
21 to take a fee of $10,500 in the Aho estate.

12. TFB's answers to Respondent' First Request for Admissions:

9. **Q: Admit that Kivisto did not steal from any estate.**
A. Denied.

10. Q. Admit that Kivisto did not commit Medicaid fraud.
A. Objection. Relevancy. Form. Calls for legal conclusion.

13. At Petitioner's 12/31/07 Deposition before the Grievance Committee Petitioner testified under oath:

(p.52)

EXAMINATION
BY MR. MALASKY:
Q Am I correct that this settlement agreement was not completed in a timely fashion, namely being prior to the passing of Johnson?
A Right, and what happened was I answered -- I gave them all of the documents and they wrote back to me and says we are reviewing them, hold up. A month passed.

(p.53)

And that's in fact what happened.
Q And then that further exacerbated the litigation?

A No. There was no litigation at that time.
Q Further exacerbated the litigation under Johnson and --
A No. At this time, there was no litigation.
When we settled the ten thousand dollars, there was no litigation.
MR. ALI: I guess what Bruce is asking you could have deposited or interpled the funds into the court registry at that time.
THE WITNESS: No, that's not what he is asking because what you are not recognizing is we settled this. I submitted the documents to them and they wrote back and says, hold up, we are reviewing them, and that took a month. They reviewed it for a month. Every time I tried to do something, it just sits there.
In the meantime, Mrs. Johnson died, and my position has been that changed the rules, that changed the rules, because then we have the

23 **beneficiaries in Finland who are the owners of the**
24 **money subject to creditor claims.**

14. Petitioner has alleged and alleges, *inter alia*, that TFB together with Susan I. Robbins, Esq., Geoffrey M. Chinn, Esq., MillerCanfield, Brian K. Duffey, Esq. and HodgsonRuss fabricated and conspired to fabricate evidence, namely, that the "**motion to compel distribution was eventually settled with respondent agreeing to accept $10,500.00 in attorneys fees for his work on the Aho Estate.**" [2]

15. In the record before this Court there is no evidence of this "agreement". Such [fabricated] evidence originates, *inter alia*, from the Complainant, Susan I. Robbins, Esq., and is contained in the "Privileged Portions of Petitioner's Bar Disciplinary File".

16. There is more here than just fabrication of evidence. In the penultimate paragraph of page 3 of the Report of Referee Judge Moe states:

> Again, a default having been entered, by operation of law the Respondent is found guilty of the following allegations. **It should be noted, that even if a default had not been entered, the evidence on record shows clearly and convincingly that the Respondent did commit the violations with which he stands accused.**

---

[2] Milja Johnson died 1/6/04; Letters of Administration were issued 4/6/04; Motion to Compel Distribution was settled on 7/14/04.

17. Just what evidence is the Referee referring to? Since there is no evidence in the record the Referee must be referring to "evidence" outside the record. The transcripts of the 11/10/08 Hearing show the Referee stating:

> At 33: The letters in her [Johnson Estate] estate is void too. It's a fraud on the court.
>
> At 38: It [Proof of Service] says a copy of the inventory was mailed to, in effect, his relatives, who were allegedly the heirs.
>
> At 64: [b]ecause I think he had a fear of being found out that the whole Johnson estate was a farce, a total fraud on the court.
>
> At 65: And if that's true, [Milja Johson did not own property in Palm Beach[3] County] Palm Beach County does not have jurisdiction in any way, shape or form over her estate. And if it's true, that the Johnson estate, they ripped everybody off, including Ms. Johnson,

---

[3] Milja Johnson was not a Florida resident and did not own real property in Florida. Petition specifically alleged that Johnson was domiciled in NY. The Palm Bach County Probate Court had jurisdiction over the Johnson Estate. *Pastor v. Pastor*, 929 So.2d 576 (4th DCA 2006) and *Cuevas v. Kelly*, 873 So. 2d 367 (2nd DCA 2004). Also all parties in interest had been been notified in writing of their right to contest jurisdiction. None had done so.

while she was alive. You understand what I mean?

18. The allegation that the Johnson Estate was "a farce, a total fraud on the court" and that "they ripped everybody off" originates, *inter alia*, from the Complainant, Susan I. Robbins, Esq., and such evidence is contained in the "Privileged Portions of Petitioner's Disciplinary File". TFB knows and has known that such allegations are false. TFB at no time contacted or attempted to contact the 4 Finnish intestate Johnson Estate heirs who bore the burden of the compensation. Evidence of such failure to investigate is contained in the "Privileged Portions of Petitioner's Disciplinary File"

19. To the knowledge of TFB Susan I. Robbins, Esq., Geoffrey M. Chinn, Esq., MillerCanfield, Brian K. Duffey, Esq. and HodgsonRuss *via* improper *ex parte* communications with Referee Leroy H. Moe, fixed and conspired to fix these proceedings by representing that the Johnson Estate letters were void; the 4 Finnish intestate Johnson Estate heirs were not Milja Johnson's heirs-at-law, but rather, Petitioner's relatives and/or friends, and/or straw persons in Finland; and, that Petitioner and the 4 Finnish intestate Johnson Estate heirs "ripped everybody off, including Ms. Johnson, while she was alive." This evidence should be contained in the "Privileged Portions of Petitioner's Disciplinary File"

20. The grievance, TFB Complaint, and the Report of the Referee are a farce and a fraud on this Court. Because TFB has a fear of being found out TFB refuses to produce the "Privileged Portions of Petitioner's Bar Disciplinary File".

21. Since "any reports, correspondence, papers, recordings, and/or transcripts of hearings furnished to, served on, or received from the respondent or the complainant" form part to the definition of "public record" as defined by R. Regulating the Fla. Bar 3-7.1(b) such [fabricated] and/or [fixed] evidence are public records and are not exempt from disclosure.

22. However, TFB has an answer as follows:

Additionally, some of the records not meeting the public records definition would also be confidential pursuant to Rule 1-14.1(a) because they are designated as such by court rule, or constitute attorney work product, or attorney-client communications.

23. This puts TFB above the law accountable to no one. Without even providing a privilege log TFB, by fiat, declares that whatever documents are not public records within the meaning of the rules are covered by attorney work product or attorney-client privilege.

24. This cannot stand. Fabrication of evidence and fixing judicial proceedings constitute obstruction of justice under both federal and state law and also constitute violations of 18 U.S.C. §§ 242 & 241. Not even the president of the United States has the absolute power that TFB arrogates to itself. *United States v. Nixon*, 418 U.S. 683, 709 (1974):

> But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than, in our view, that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. at 88. We have elected to employ an

> adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. **The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.**

25. The grievance was based on knowingly bad faith allegations of Medicaid fraud. NYC Medicaid has stonewalled Petitioner's Freedom of Information Law requests for evidence of when and in what amounts NYC Medicaid paid benefits on behalf of Milja Johnson. Exhibit C. Petitioner will need to file an Article 78 proceeding in New York in order to obtain the documentary evidence.

26 TFB Complaint was based on the knowingly bad faith allegation that the "**motion to compel distribution was eventually settled with respondent agreeing to accept $10,500.00 in attorneys fees for his work on the Aho Estate.**" TFB has stonewalled Petitioner's request to produce the "Privileged Portions of Petitioner's Bar Disciplinary File".

27. At Petitioner's 12/31/07 Deposition before the Grievance Committee Petitioner testified under oath:

(p.12)

22 Q The Johnson estate tell me in terms of the 23 fees that you collected that you just told us about was
24 that done by virtue of waivers that were executed in
25 connection with closing out that estate?

(p.13)

1 A The fees were agreed to and the fees were
2 agreed to with the beneficiaries and when the fees were
3 agreed to, then it was closed out and they closed -- they
4 executed waivers which are filed with the court. It's
5 the way I have closed every estate that I have done in
6 the last twenty years been done the same way.
7 Q Once you had the beneficiaries execute the
8 waivers, it was your position at that juncture that you
9 were free to take your fees and costs for work performed
10 on the Johnson estate subject of course to your comment

in some of the papers you submitted that you took the risk of anybody objecting?

A We discussed it because at the time of the disbursement at the time of the disbursement Miss Robbins had already filed the complaint, and we saw it basically a continuing of the litigation. In fact, it was a grievance procedure but it was continuing the litigation that she began way back in January and because we saw it and I saw it as her attempt was really to recover for medicaid the money that we were holding. That's how I interpreted it, and I think I interpreted that correctly because if that was not the case, Miss Robbins would have at that time had time to extend the time to file a claim and the Court would have decided that matter.

(p.14)

Q Your position not that we are here to discuss

the medicaid issue was she should have filed that as a class three claim in the probate court or someone on behalf of medicaid to protect medicaid's interest?

A My position is and it's correct at the time she filed the Bar complaint she still had five months to extend the time to file the claim.

Q She never did that?

A No, and because if you look at the reasons to extend the time, one of them is fraud. So she files a claim in Florida saying he defrauded us but didn't go before the Court and say we have the right to extend the claim because he defrauded us because then at least I would have had a chance under the tribunal before Judge Vonhof to argue it. At that time, we still had the money. What I was waiting for was for the two years to run out.

When I talked to the beneficiaries, I said, look, I mean I don't want – I see this litigation as being part continuing on with it and my time is going to

go skyrocket so I'm prepared to just, you know, cut the fees here and now after I respond and you can have it. And they said, well, are you sure that we can do this. And I said, yeah, I'm sure. I have gone through like ten different times and they still have a right -- they

(p.15)

still -- you know, the risk I took was they still had time.

Q I saw that you put that in your comments.

A I said, that's the risk I'm taking.

Q You were taking the risk that by distributing the money to the beneficiaries and your fees based on the waivers that had been executed that if anybody else came back to try to make a claim that you were assuming that risk?

A Yes. Essentially had medicaid successfully petitioned the judge for extension of time to file a claim and gotten that permission, I was on the hook personally.

Q Did you advise your clients of that, your beneficiary clients?
A Yeah, I told them. I basically said that as a practical matter, you guys you are there, you are in Finland. They are going to look to me as a practical matter and as a legal matter because I'm the executor. That was basically the discussion we had. And unfortunately what is really tragic about this whole case is way back if -- when -- the decedent Mrs. Johnson died in January of '05 -- '04. If at that time, Susan just would have said, fine, you know, you are the executor, here is our fee claim, here is the Hodgson

(p.16)

fee claim in the estate and here is the fee claim for the New York medicaid, it would have been over rather than making this -- filing petition to compel distribution. I couldn't believe it. Rather than fighting me on who has

control of it. It didn't matter who had control of it. Once the money was in the court, all they had to do was file their claim, New York medicaid files their claim, whatever it was. We didn't know what it was at that time. Our position was prove up your claim and then we will look at it. Well, they didn't give us a chance. New York medicaid never got a chance to prove their claim, and we never got a chance to distribute it to them because we were stuck. Once we go through the procedure to notify creditors, that's all I can do. I don't go back and say please file a claim, time is running out.

(p.23)

Q How much of that fee that was taken in the Johnson estate in your judgment -- I'm not going to hold you to an exact amount; it wouldn't be fair -- how much of that fee would you attribute to litigation or work that might have related directly or indirectly to the Aho

estate?
A Most of the -- most of that fee was for the

(p.24)

litigation. It was litigation fee. We could have
charged it to the Aho estate as well.
Q In reality what happened here from what I'm
hearing is that some of the fees that you did not get for
whatever reason in the Aho estate you eventually obtained
in the Johnson estate?
A No, no, because once -- no, because the fees
that I didn't get in the Aho estate that's up to the time
when the person died. Those fees over ten thousand I
didn't get.
Q Your testimony that -- I understand that you
said that --
A I'm the accountant. I'm doing the accounting.
Q You are saying that you did not obtain any
fees from the Johnson estate for any work performed
before the Aho estate was closed; is that your
testimony?

A No, that's not my testimony. That's not my testimony.

Q Is it your testimony that you received ten thousand dollars plus your five hundred dollars in costs for work performed --

A For the Aho estate.

(p.25)

Q -- but that you did not receive any more fees from the Johnson estate for work performed on the Aho estate from the Johnson estate?

A No, no. That's not the way I characterize. The work done on the litigation I characterize that as all for the Johnson estate for the reason, for the reason, for the reason that the -- so when the accounting comes in, the beneficiaries, the ultimate owners of the money, have a bird's eye view what it is. So I don't tell them, okay, we only got this much and, you know, I'm approving my own fees for the Aho estate.

(p. 26)

Q Just generally, can you tell us what you did
for the forty-eight thousand?
A I won the litigation and it began from -- I
mean it was a probate litigation.
MR. ALI: Just so we can keep this clear, we
want to refrain from the word litigation. Let's
talk about the Aho estate and the Johnson estate.
THE WITNESS: I think we are talking cross
purposes because legally speaking once Mrs. Johnson
dies she has a guardian. Then the beneficiaries of
the Aho estate are the people in Finland
automatically. So when you start talking about the
Aho estate and Johnson estate, they are the
beneficiaries. Then they are the Aho estate.

(p.53)

In the meantime, Mrs. Johnson died, and my
position has been that changed the rules, that
changed the rules, because then we have the
beneficiaries in Finland who are the owners of the

24 money subject to creditor claims.

28. Miriam Aho died in June, 2001; Milja Johnson died intestate on January 6, 2004. As the last two paragraphs of Petitioner's 1/31/07 deposition evidence Petitioner took the position that on of 1/6/04 the Aho Estate money (which at that time totaled $130,500.00--as of 1/6/04 Petitioner had been paid $10,500.00 in Aho Estate attorney fees and costs) belonged to the 4 Finnish intestate Johnson Estate heirs, subject to the claims of creditors. Petitioner also took the position that as of 1/6/04 the amount of Petitioner's fees was a matter between Petitioner and owners of the money—the 4 Finnish intestate heirs.

29. From 1/6/04 Petitioner allocated all his attorney time, including probate litigation time with respect to the Motion to Compel Distribution, to the Johnson Estate. Petitioner's position was that the Johnson Estate--the 4 Finnish istestate heirs--were the real parties in interest in the Motion to Compel. *Morales v. Iasis Health Care*, 901 So.2d 965 (Fla. 2nd DCA 2005)

30. Since prior to the death of Milja Johnson Petitioner had taken the position that Ms. Robbins' client, JASA, was not legally entitled to possession of the $130,500.00, after the death of Milja Johnson on 1/6/04, Petitioner did not change his position in this respect. That is clear.

31. After the death of Milja Johnson and after the Johnson Estate letters had been issued by the Palm Beach County Probate Court, Ms. Robbins' client, JASA, sought possession of the money via a Motion to Compel Distribution filed in Palm Beach County. JASA lost that litigation in July 2004 with prejudice pursuant to a Stipulated Settlement and Agreed Order.

32. The record before this Court shows that in July, 2004 the Aho Estate distributed the $130,500.00 to the Johnson Estate and pursuant to the Stipulated Settlement the Johnson Estate paid all the fees of Miller,Canfield, Hodgson Russ and JASA .

33. It took Petitioner some time to realize how TFB was prosecuting the case. TFB intended to have Susan I. Robbins, Esq. and Brian K. Duffey, Esq. perjure themselves on the witness stand by testifying as Mr. Soifer falsely represented at the 11/10/08 hearing:

> 17 He [Kivisto] forced JASA to hire an attorney down
> 18 here. Thus, costing the estate more money in
> 19 attorney's fees, to file that motion to
> 20 compel distribution before he finally agreed
> 21 to take a fee of $10,500 in the Aho estate.

34. Then Mr. Soifer's "expert witness" would testify that most of the Petitioner's Johnson Estate time was in reality Aho Estate time. Mr. Soifer then argues and would argue that Petitioner gouged the "Estates" by taking more than he had agreed to. This is brilliant but false. Mr. Soifer knows this. These people are real pros. This evidence of this testimony is contained in the "Privileged Portions of Petitioner's Bar Disciplinary file".

35. Although there is no documentary evidence in the record before this Court to vary the July, 2004 Stipulation Agreement to substantiate this false allegation, under the R. Regulating the Fla. Bar

this perjured testimony will come in to vary the Stipulation:

36. R. Regulating the Fla. Bar 3-7.6(l) provides:

> (*l*) **Parol Evidence.** Evidence other than that contained in a written attorney-client contract may not be used in proceedings conducted under the Rules Regulating The Florida Bar to vary the terms of that contract, except competent evidence other than that contained in a written fee contract may be used only if necessary to resolve issues of excessive fees or excessive costs.

37. First we have a bad faith grievance where there is no right to confront Ms. Robbins as would have been the case had Ms. Robbins filed a Motion to Extend Time to File [Medicaid claim] Claim. Now Petitioner will be set up by the perjured testimony of Ms. Robbins and Mr. Duffey. Checkmate.

38. Petitioner chose not to participate in such corrupted judicial proceedings. As can be seen by the transcripts of the 11/10/08 hearing, fortunately, the Referee, for all intents and purposes, confirmed not only his bias but that the proceedings over which he was presiding had been "fixed." These are serious charges. However, the factual basis has been laid to compel TFB to produce the "Privileged Portions of Petitioner's Bar Disciplinary File".

39. There is more evidence to be collected with respect to the corruption of these proceedings before this Court than the "Privileged portions of Petitioner's Bar Disciplinary File". Asking Petitioner, at this to file, to file his Brief in Support of Petition for

Review would be a mockery of justice. This Court has the authority to compel TFB to produce "Privileged Portions of Petitioner's Bar Disciplinary File".

40. Petitioner submits that this Court has the statutory and constitutional duty, both under the Florida Constitution and the Fourteenth Amendment of the United States Constitution, to compel TFB to produce "Privileged Portions of Petitioner's Bar Disciplinary File".

VI. CONCLUSION

WHEREFORE, Petitioner respectfully requests that the Court issue a Writ of Mandamus to Compel TFB to produce "Privileged portions of Petitioner's Bar Disciplinary File".

VII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular mail to Michael David Soifer, Esq., Bar Counsel, The Florida Bar, 5900 North Andrews Ave., Suite 900, Fort Lauderdale, FL 33309; to Kenneth Lawrence Marvin, Esq., Staff Counsel, and George Rudge, Records Manager, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399.

VIII. CERTIFICATES OF COMPLIANCE

I hereby certify that the foregoing complies with the font requirements of the Florida Rules and that I have complied with Administrative Order AO04-84 in that a copy of this Petition has been electronically submitted this 20th day of January 2010.

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By: /jk Kivisto/
J.K. Kivisto
FL Bar # 362638

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-61758-UU

JUSSI K. KIVISTO,

Plaintiff,

v.

MICHAEL DAVID SOIFER,
KENNETH LAWRENCE MARVIN,
MILLER, CANFIELD, PADDOCK AND STONE,
PLC; and, SUSAN I. ROBBINS

Defendants.

PLAINTIFF'S MOTION TO COMPEL
PRODUCTION PURSUANT TO RULE 45
SUBPOENA

Plaintiff respectfully files his Motion to Compel Ronna Friedman Young to produce the documents set out in Rule 45 Subpoena and for grounds states as follows:

1. Plaintiff's Rule 45 Subpoena was served on Ms. Young on 2/28/2011. (Exhibit A)

2. On March 7, 2011 Greenberg,Traurig, counsel for the Defendants Soifer and Marvin, now also representing Ms. Young, served objections to the production of documents. (Exhibit B)

3. Like Defendant Soifer, Ms. Young is a Florida Bar Bar Counsel situated in the same offices as Defendant Soifer in Fort Lauderdale and was the Bar

Counsel in the state court case until she was replaced as Bar Counsel by Defendant Soifer.

4. On December 1, 2006 Ms. Young informed Plaintiff that the Medicaid issue was off the table. (Exhibit C) Therefore, Ms. Young has personal knowledge concerning the circumstances of the Defendants' perjury and fabrication of evidence.

5. Ms. Young has as much access to and control of the documents requested as Defendant Soifer and Marvin. Ms. Young is playing a shell game. Greenberg, Traurig has access to the documents if not actual possession of the documents. This is not a FOIA request to be directed to TFB custodian of records.

6. In their Rule 26 Disclosures, (Exhibit D) Defendants Soifer and Marvin admit to be in possession of a file which they describe as "privileged and/or confidential portions" of Plaintiff's Bar disciplinary file. (TFB Secret File).

7. TFB's Secret File is a key to the whole case. Watergate had its tapes the existence of which was discovered by happen chance. We have our tapes too: TFB Secret File. In Watergate, once the tapes were produced the Nixon presidency was over; similarly, here once TFB Secret File is produced Defendants' smoke and mirror defense will collapse like a house of cards.

8. Defendants Soifer and Marvin have no intention having the TFB Secret File that will sink their ship produced to Plaintiff.

9. First, the Defendants have jointly determined and ensured that no discovery will take place until after the March 11, 2011 Scheduling Conference. All the Defendants announced that they would not be available for depositions until after the March 11, 2001

Scheduling Conference and that it would be more "efficient and appropriate" to discuss discovery "when we are all together". Today the MCPS Defendants inform they will represent JASA in a Rule 45 Subpoena which was returnable March 8, 2011 but will not respond until Monday. (Exhibit E)

10. In her 3/7/2011 email (Exhibit F) Attorney Sharpe states:

> Finally, with respect to the Order Denying the joint motion for stay of discovery, the Bar Defendants have 30 days to request a motion for reconsideration, and we are contemplating such a request.

11. Ms. Young's claims of privilege and confidentiality with respect to the requested documents has been waived. Ms. Young's failure to file a privilege log as required by Local Rule 26.1.G.3, Local Rules Appendix A. Discovery Practices Handbook Rule V.B, and Fed. R. Civ. 26(b)(5). In re Application of Chevron Corp. No. 10-mc-00002 (LAK) 2010 WL 4118093 (S.D.N.Y. Oct. 20, 2010), attached.

12. There is a well establish procedure for the invocation of alleged privileges in response to subpoenas and requests to produce. Ms. Young must enumerate the documents as to which she claims privilege and assert her privilege claims in the manner prescribed by both local and federal rules. Ms. Young cannot rely on "mere conclusory or ipse dixit assertions, for any such rule would foreclose the meaningful inquiry into the existence of the relationship, and any spurious claims could never be exposed." von Bulowa by Auersperg v. Bulow, 811 F.2d 136,146 (2d Cir. 1987) (quoting In re Bonanno, 344 F.2d 830, 833 (2d Cir. 1965)

13. These procedures serve important purposes. Privileges can serve to conceal highly relevant evidence that is important to the just resolution of the controversy.

14. Ms. Young's claim that compliance with the subpoena would be unduly burdensome is also conclusory. There is no burden in producing TFB Secret File or any of the other documents set out in the subpoena. Ms. Young, together with Defendants Soifer and Marvin, being Florida Bar prosecutors, have complete access to TFB files including TFB Secret File.

15. Ms. Young's assertions that the document requests are insufficiently particular is without merit. First, there is no uncertainty as to the type of evidence Plaintiff seeks. Ms. Young has refused to provide any information whatsoever about the content of TFB Secret File or other documents requested. Plaintiff cannot reasonably be expected to identify with particularity the contents of TFB files and TFB Secret File where the knowledge of the contents lies exclusively with Ms. Young and Defendants Soifer and Marvin. In Re Application of Chevron Corp, 709 F.Supp. 2d 283, 297 (S.D.N.Y. 2010).

16. Also since Defendants Soifer and Marvin wrote the Default Judgment and Report of Referee based upon TFB files and TFB Secret File, disclosed the TFB files and TFB Secret File to Susan Robbins, Brian K. Duffey, and expert Charles Jeffrey Goldman, Esq., the privileges claimed by Ms. Young have been waived through disclosure to third parties. Disclosure of documents to a testifying expert and to witnesses waives the privileges claimed by Ms. Young. (Exhibit G)

17. At the November 10, 2008 hearing the Referee admitted that Defendant Soifer wrote the default judgment: (at page 7 of the 11/10/08 transcript)

25 THE COURT: All right. A default on

1 the allegation and the merits of the
2 allegation was entered by an order signed by
3 the referee on October 30th, 2008. The
4 findings in that order were discussed in open
5 court.
6 It is true that that order was prepared
7 by Bar counsel, Mr. Soifer, and that I was
8 out of town and just arrived back in town, I
9 believe, on the 30th. And I read through it.
10 And there were a couple of editorial changes
11 I might have made. And a couple of things I
12 would have worded differently.
13 I'm fully aware of my responsibility to
14 make sure the order accurately reflects
what
15 happened. And that in a perfect world I
16 would have dictated the whole thing myself.
17 But as it recites, it came on for hearing,
18 October 20th, and then I was out of town for
19 a whole week or more.
20 And by the time I got it, it was
21 October 30th. And the final hearing was set
22 for November 10th. So time is of the
23 essence.
24 And due to other logistical matters, I
25 signed the order as submitted by The
Florida

1 Bar. I say that, because in the latest copy

of a verified motion duly assigned the case,
it refers to or at least alleges that Bar counsel prepared that order. Which is true.
Nonetheless, the doesn't effect the accuracy of what happened.

18 It is beyond question that Defendant Robbins committed perjury in filing the July 25, 2005 grievance; it is beyond question that TFB prosecutors, Defendants Soifer and Marvin, suborned perjury—they knew then and know now, that Defendant Robbins committed perjury in filing the grievance. Defendant Robbins to this day has not denied that she committed perjury. More importantly Defendants Soifer and Marvin have not required Defendant Robbins to deny the charge.

19. The documentary evidence is clear what the terms of the July, 2004 Settlement Agreement were. The attorney fees were confined to those of Miller,Canfield and HodgsonRuss. The Defendants' allegation that Plaintiff, the winning attorney, would permit the losing attorneys to dictate his fees, (and take less than the losing attorneys) is an Alice in Wonderland fantasy. The owners of the money in question, the four Finnish beneficiaries, Plaintiff's clients, under Florida probate law, set the Plaintiff's fees, not disgruntled losing attorneys and compromised prosecutors.

20. Plaintiff has pled a prima facie case perjury and fabrication of evidence. The Defendants have not denied the allegations of perjury and fabrication of evidence. The evidence of perjury and fabricaton of evidence is contained in TFB files and the TFB Secret File.

21. Because the Defendants' perjury and fabrication of evidence relate to the Defendants' corruption of the judicial process they trigger the crime fraud-exception which vitiates any otherwise applicable privilege, including the privileges claimed by Ms. Young. In re Chevron Corp, No. 10-mc-21 (D.N.M. Sept 13, 2010); . In re Application Chevron Corp, No. 10-cv-1146 (S.D. Cal. Sept. 10, 2010); Chevron Corp v. Champ. No. 10-mc-27(W.D.N.C. Aug. 30, 2010), attached.

22. Fabrication of evidence and fixing judicial proceedings constitute obstruction of justice under both federal and state law and also constitute violations of 18 U.S.C. §§ 242 & 241. Not even the president of the United States has the absolute power that TFB prosecutors arrogate to them. United States v. Nixon, 418 U.S. 683, 709 (1974):

> But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than, in our view, that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." Berger v. United States, 295 U.S. at 88. We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To

> ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

23. Finally the documents are discoverable under § 1983 pursuant to the reasoning of the Supreme Court in Skinner v. Switzer, slip opinion, March 7, 2011, attached.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 9, 2011 I filed the foregoing original Request with the Clerk of the Court by hand delivery. The CM/ECM system will send notice of the filing electronically Karusha Y. Sharpe, Esq., Greenberg Traurig, 101 East College Ave., Tallahassee, FL 32301; W. Scott Turnbull, Esq. Crary, Buchanan, et al 555 Colorado Avenue, Stuart, FL 34994 and, Kimberley K. Kefalas, Esq., Suzanne L. Wahl, Esq. and Robert J. Wierenga, Esq., MillerCanfield, 101 North Main Street, 7th Floor, Ann Arbor , MI 48104.

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